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NO. 34722

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

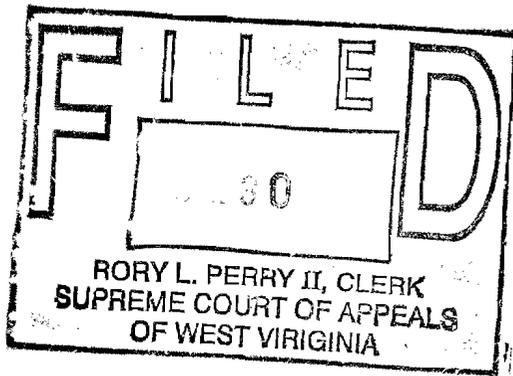
STATE OF WEST VIRGINIA,

Appellee,

v.

JUSTIN KEITH BLACK,

Appellant.



BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

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TABLE OF CONTENTS

| | Page |
|--|-------------|
| I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW | 1 |
| II. STATEMENT OF FACTS | 1 |
| III. RESPONSE TO ASSIGNMENTS OF ERROR | 6 |
| IV. ARGUMENT | 9 |
| A. UPON WEIGHING THE EVIDENCE, THE STATEMENT APPELLANT GAVE TO THE STATE POLICE WAS NOT GIVEN AS A RESULT OF COERCION BUT WAS VOLUNTARY. THIS IS A PROPER ISSUE TO BE DETERMINED BY THE FACT-FINDER, AND THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION NOR VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS | 9 |
| 1. The Standard of Review | 9 |
| 2. After Extensive Testimony the Trial Judge Determined That Appellant's Statement to the West Virginia State Police Was Voluntary Rather Than Coerced. Therefore, the Evidence Was Properly Admitted | 10 |
| B. THE EXCLUSION OF THE EXPERT TESTIMONY OF DR. BOBBY MILLER DID NOT VIOLATE <i>CRANE</i> v. <i>KENTUCKY</i> , 476 U.S. 683, 106 S. Ct. 2142 (1986), NOR DENY APPELLANT HIS DUE PROCESS RIGHTS. APPELLANT WAS ABLE TO TESTIFY AS TO THE CREDIBILITY OF HIS STATEMENT TO THE STATE POLICE, AND THE RULING OF THIS UNITED STATES SUPREME COURT CASE IS INAPPLICABLE HERE | 14 |
| 1. The Standard of Review | 15 |
| 2. There Was No Violation of <i>Crane</i> Nor of Appellant's Due Process Rights in the Exclusion of the Testimony of Dr. Bobby Miller, but Rather a Proper Use of the Circuit Court's Discretion Regarding the Admissibility of Expert Testimony | 15 |

| | | |
|----|---|----|
| C. | THE CIRCUIT COURT DID NOT ERR IN EXCLUDING THE TESTIMONY OF THE OWNER OF YELLOW CAB, BUT RATHER EXERCISED PROPER AUTHORITY UNDER ITS DISCRETION | 17 |
| 1. | The Standard of Review | 17 |
| 2. | There Was No Abuse of Discretion on the Part of the Circuit Court Regarding the Decision to Exclude the Testimony of the Owner of Yellow Cab as a Rebuttal Witness for Appellant. This Testimony Was of Very Little Value. If There Was Any at All, to Contradict the Testimony of Brian DeMent, and Its Exclusion Was a Matter of Discretion on the Part of the Circuit Court | 18 |
| D. | THERE WAS NO ABUSE OF DISCRETION ON THE PART OF THE CIRCUIT COURT IN EXCLUDING THE TESTIMONY OF JESSICA CARSON. IT WAS WELL WITHIN ITS BROAD DISCRETION TO EXCLUDE IT ACCORDING TO THE WEST VIRGINIA RULES OF EVIDENCE | 19 |
| 1. | The Standard of Review. | 20 |
| 2. | As With the Issue of the Jamie Malone Testimony, the Circuit Court Decision to Exclude this Evidence Was An Exercise Within Its Sound Discretion And No Abuse Occurred | 20 |
| E. | THE CIRCUIT COURT DID NOT ERR IN DENYING APPELLANT’S MOTION TO CHANGE VENUE/VENIRE. DESPITE THIS CASE BEING REPORTED IN THE MEDIA, VIRTUALLY NO PROSPECTIVE JUROR HAD HEARD OF IT WHEN QUESTIONED, AND THOSE THAT HAD READ ABOUT THE CASE ONCE PROCEEDINGS HAD COMMENCED WERE EXCUSED FOR CAUSE. THERE WAS ABSOLUTELY NO REASON TO BELIEVE THERE WAS ANY BIAS AGAINST APPELLANT WITH THIS PANEL | 22 |
| 1. | The Standard of Review | 23 |
| 2. | There Was No Grounds to Grant Appellant’s Motion to Change Venue/Venire, and the Circuit Court Did Not Abuse Its Discretion in Denying It. | 23 |

| | | |
|----|---|----|
| F. | THERE IS NO EVIDENCE THAT THIS ONE STATEMENT MADE IN PASSING BY ALICIA WIBBLING DURING REDIRECT EXAMINATION AMOUNTED TO EXCULPATORY EVIDENCE WITHHELD BY THE STATE IN VIOLATION OF <i>BRADY, SUPRA</i> | 26 |
| 1. | The Standard of Review | 26 |
| 2. | Alicia Wibbling’s Brief Mention of a Person Named “Punkin” Did Not Amount to Exculpatory Evidence Which the State Failed to Disclose in Violation of <i>Youngblood</i> | 27 |
| G. | THE CIRCUIT COURT DID NOT ERR IN DENYING APPELLANT’S MOTION TO EXCLUDE EVERY WITNESS THE STATE INTENDED TO USE TO ESTABLISH HIS PRESENCE AT THE SCENE OF THE OFFENSE. EVEN IF THERE WAS A TECHNICAL VIOLATION OF RULE 12.1(b) OF THE WEST VIRGINIA RULES OF CRIMINAL PROCEDURE, THERE WAS NO PREJUDICE, AND THE CIRCUIT COURT USED ITS SOUND DISCRETION IN APPLYING THIS RULE | 28 |
| 1. | The Standard of Review | 29 |
| 2. | There Was No Abuse of Discretion On the Part of the Circuit Court In Denying this Motion. Brian DeMent Was a Witness in the State’s Case-in-Chief Rather Than a Rebuttal Witness To an Alibi Defense, And Rule 12.1(b) of the West Virginia Rules of Criminal Procedure Is Inapplicable | 29 |
| H. | THERE WAS NO ABUSE OF DISCRETION IN THE CIRCUIT COURT ALLOWING THE STATE TO MAKE A REFERENCE TO THE STATEMENT MADE BY BRIAN DeMENT TO HIS UNCLE REGARDING THE CRIME. APPELLANT MISAPPLIES <i>CRAWFORD</i> AND <i>MULLENS</i> IN MAKING THE ARGUMENT THAT THIS CONSTITUTED REVERSIBLE ERROR | 33 |
| 1. | The Standard of Review | 33 |
| 2. | Appellant Fails To Meet the Standard To Establish That the Circuit Court Abused Its Discretion Regarding the Reference Made By the State During Closing Argument. No Violation of <i>Crawford</i> or <i>Mullens</i> Occurred | 34 |
| V. | CONCLUSION | 38 |

TABLE OF AUTHORITIES

| | Page |
|--|---------------|
| CASES: | |
| <i>Brady v. Maryland</i> , 373 U.S. 83, 83 S. Ct. 1194 (1963) | 8, 26, 27, 28 |
| <i>Crane v. Kentucky</i> , 476 U.S. 683, 106 S. Ct. 2142 (1986) | 6, 14, 15, 16 |
| <i>Crawford v. Washington</i> , 541 U.S.36, 124 S. Ct. 1354 (2004) | 8, 32, 34, 36 |
| <i>Greer v. Minnesota</i> , 493 F.3d 952 (8th Cir. 2007) | 16 |
| <i>State ex. rel. Jones v. Recht</i> , 221 W. Va. 380, 655 S.E.2d 126 (2007) | 15 |
| <i>State v. Boxley</i> , 201 W. Va. 292, 496 S.E.2d 242 (1997) | 13; 14 |
| <i>State v. Derr</i> , 192 W. Va. 165, 451 S.E.2d 731 (1994) | 23, 24, 25 |
| <i>State v. Guthrie</i> , 205 W. Va. 326, 518 S.E.2d 83 (1999) | <i>passim</i> |
| <i>State v. Horton</i> , 203 W. Va. 9, 506 S.E.2d 46 (1998) | 23, 24 |
| <i>State v. Keesecker</i> , 222 W. Va. 138, 663 S.E.2d 593 (2008) | 34, 37 |
| <i>State v. LaRock</i> , 196 W. Va. 294, 470 S.E.2d 613 (1996) | 19, 22 |
| <i>State v. Louk</i> , 171 W. Va. 639, 301 S.E.2d 596 (1983) | 9, 17, 20, 29 |
| <i>State v. Miller</i> , 195 W. Va. 656, 466 S.E.2d 507 (1995) | 32, 33 |
| <i>State v. Mullens</i> , 221 W. Va. 70, 650 S.E.2d 169 (2007) | <i>passim</i> |
| <i>State v. Persinger</i> , 169 W. Va. 121, 286 S.E.3d 261 (1982) | 10 |
| <i>State v. Peyatt</i> , 173 W. Va. 317, 315 S.E.2d 574 (1983) | 9, 17, 20, 29 |
| <i>State v. Williams</i> , 190 W. Va. 538, 438 S.E.2d 881 (1993) | 9, 13, 14 |
| <i>Youngblood v. West Virginia</i> , 547 U.S. 867, 126 S. Ct. 2188 (2006) | 26, 27, 28 |

STATUTES:

W. Va. Code § 61-2-1 1

OTHER:

Cleckley, Franklin D. *Handbook on West Virginia Criminal Procedure*,
vol. I (2d ed. 1993) 31

W. Va. R. Crim. P. 12.1 8, 29, 30, 32

W. Va. R. Crim. P. 12.1(b) 28, 29, 31

W. Va. R. Crim. P. 12.1(d) 32

W. Va. R. Crim. P. 12.1(e) 32

W. Va. R. Crim. P. 16 33

W. Va. R. Evid. 402 21

W. Va. R. Evid. 403 7, 16-17, 19

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STATE OF WEST VIRGINIA,

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JUSTIN KEITH BLACK,

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BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

I.

**KIND OF PROCEEDING AND
NATURE OF THE RULING BELOW**

This is an appeal by Justin Keith Black (hereinafter “Appellant”) from the September 29, 2008, order of the Circuit Court of Cabell County (Cummings, J.), which sentenced him to a term of 40 years in the State penitentiary upon his conviction by a jury of one count of second degree murder in violation of West Virginia Code § 61-2-1. On appeal, Appellant claims that the circuit court committed various errors, denying him a fair trial.

II.

STATEMENT OF FACTS

On August 8, 2002, the West Virginia State Police station in Cabell County received a call from some people engaged in logging in an area of Hickory Ridge where found a dead body. (Tr.,

149-50, Apr. 15, 2008.) Sergeant Tony Cummings was one of the members of the State Police that went to the scene. (*Id.* at 150.) Sergeant Cummings found a deceased female in this area and reported this to the State Police. He testified that the deceased female was lying downhill near a lean-to type building with a tube top on pulled over her arms with no clothing below. (*Id.* at 151.) The sergeant stated that her upper torso and head were badly decomposed. (*Id.*) However, the female's hands were still intact, and the State Police were able to identify her through the FBI via fingerprints as being Ms. Deanna Crawford. (*Id.* at 152.)

The case went cold for a few years. However in January of 2007, Sergeant Cummings and the West Virginia State Police in Cabell County received information from the county sheriff's office that a man by the name of Brian DeMent was involved in the murder, along with Appellant, Nathan Barnett, and Phillip Barnett. (*Id.* at 154.)

On January 28, 2007, Brian DeMent agreed to come to the State Police station to give a statement. He was Mirandized and interviewed by Sergeant Cummings and a couple other State Police officers. (*Id.* at 157.) During this interview, Mr. DeMent told the officers that he was at a party on or about August 5, 2002, at Appellant's residence. (*Id.*) Mr. DeMent was informed during the interview that he was free to go at any time. (*Id.* at 159.) Mr. DeMent gave various statements. The last statement he gave to the State Police, he admitted his actual hands-on involvement in the murder of Ms. Crawford. (*Id.* at 160.) Mr. DeMent was eventually arrested. (*Id.* at 161.)

Appellant contacted Sergeant Cummings on January 29, 2007, and said that he heard the latter was looking for him. He agreed to come down to the detachment, and did so shortly thereafter. (*Id.* at 162.) The sergeant told Appellant what he wanted to talk to him about while on the telephone. (*Id.* at 166.) Upon arriving, Sergeant Cummings advised Appellant of his Miranda rights, and the

latter signed a form to this effect. (*Id.* at 163.) The sergeant explained to Appellant what he wanted to talk to him about. At no time did it appear that Appellant was under the influence of drugs or alcohol, that he did not understand what was occurring or that he was coerced into coming to the detachment. (*Id.* at 164-65.) During this time, Sergeant Cummings told Appellant that he was free to leave. (*Id.* at 165.) The sergeant called in Trooper Kim Pack, who was not on duty at the time, to come in to the detachment and conduct an interview with Appellant. (*Id.* at 167.) Appellant, Sergeant Cummings and a couple other officers engaged in small talk and watched television while waiting for Trooper Pack in the sergeant's office. (*Id.* at 169.) Trooper Kim Pack was called due to her training and experience in conducting interviews, and it took her approximately two to three hours to arrive at the detachment. (*Id.* at 168-69.)

Upon West Virginia State Trooper Pack beginning the interview with Appellant, she read the Miranda form to him, marked out the "Arrest" portion and had him initial and sign the form accordingly, indicating he understood. (Tr., 232-33, Apr. 16, 2008.) Although Appellant gave a very limited version of his role in Ms. Crawford's demise, he did admit that he was with her, Brian DeMent, Phillip Barnett, and Nathan Barnett during the evening in question. (*Id.* at 235.) According to Trooper Pack, Appellant stated that he drove Deanna Crawford, Brian DeMent, Phillip Barnett, and Nathan Barnett from his house where he was having a party to an area near Hickory Ridge Road where there was an abandoned building. He stated that he stayed behind near the vehicle while the others went to another area. At some point, Phillip and Nathan Barnett came running back with red faces and left Ms. Crawford and Mr. DeMent behind. According to Appellant, he and the Barnetts went back to his house, leaving the others. (*Id.* at 235.) After this questioning, Trooper Pack indicated to Sergeant Cummings that Appellant had some information regarding Deanna Crawford's

death. In light of this, the sergeant took an audio-recorded statement from Appellant. (Tr., 173, Apr. 15, 2008.) After this, Corporal Mike Parde of the West Virginia State Police, who was present during the recorded statement, Mirandized Appellant, and took a written statement from him. (Tr., 253, Apr. 16, 2008.) In this statement, Appellant gave the same limited-involvement version of events as he gave Trooper Pack where he drove Ms. Crawford and the other men to this area and left her and Brian DeMent at the scene. (*Id.* at 258-59.)

Although she stated that she could not remember any details of any parties at Appellant's residence during this time due to her drug addiction, Alicia Wibbling gave a statement to Sergeant Cummings on February 15, 2008, to which she affirmed giving at trial. (Tr., 565-66, 573-74, Apr. 17, 2008.) In that statement she witnessed Deanna Crawford, Appellant, Brian DeMent, Phillip Barnett, and Nathan Barnett leave the party in question together in a car. (*Id.* at 565, 568.) In this statement, she also said that Appellant, Phillip Barnett, and Nathan Barnett came back to the party without Deanna Crawford or Brian DeMent. (*Id.* at 579.) Although she attempted to retract her statement at trial, Tara Gillespie gave a statement to the State Police on January 31, 2007, that at one of the parties at Appellant's residence, he and three others took Ms. Gillespie's car and later brought it back. Despite her attempts to retract, Ms. Gillespie did affirm that she gave this statement to the State Police. (*Id.* at 596-608.)

Brian DeMent testified that on the night in question, he, Appellant, Ms. Crawford, Phillip Barnett, and Nathan Barnett left the party in a car and drove about two miles to the crime scene. (*Id.* at 435-37.) He stated that Appellant drove, Deanna was in the front passenger side, and everyone else was in the backseat of the vehicle, Phillip sitting directly behind the victim. (*Id.* at 436.) He identified the property where they stopped as an abandoned farm with a building like a house or

shed. (*Id.* at 437.) Upon stopping, Phillip hit Deanna in the face. (*Id.*) At this point, Mr. DeMent testified, that all four men started screaming "Let's get this b----. Let's get this b----." (*Id.* at 438.) Brian DeMent testified that he dragged the victim out of the car by her neck and hit her once. (*Id.*) Once she was taken out of the car, all four men started hitting her, including Appellant. Most of these blows were to the body. (*Id.* at 439.) Eventually, Mr. DeMent stated that he quit engaging in the beating and went into the woods. (*Id.*) When Brian DeMent left the area and hid, he said he heard Deanna Crawford begging for her life; screaming, "Please don't kill me. Stop hitting me." (*Id.*) Mr. DeMent stated that this went on for approximately five to ten minutes. (*Id.*) He testified that eventually everything went quiet, and the three men got back in the car and headed toward Appellant's residence. (*Id.* at 441.) Mr. DeMent testified that he then went back to the area where the beating occurred to locate Ms. Crawford. He said that he found her body further into the woods, where he checked for a pulse and discovered that she was dead. (*Id.* at 441-42.)

Dr. Hamada Mamoud, West Virginia Deputy Chief Medical Examiner, testified regarding the medical examination of the victim. From the report, he testified that there was soft tissue injuries or blunt force trauma to the victim's legs. (Tr., 304, Apr. 16, 2008.) He stated that the report indicated she suffered from contusions and abrasions on her shins and feet. (*Id.* at 305.) According to Dr. Mamoud, the report documented that Ms. Crawford had a fracture of the hyoid bone and a laceration of the right thyroid cartilage. (*Id.* at 312.) He testified that this indicated that strangulation occurred. (*Id.*) Based on this, the chief medical examiner concluded that Deanna Crawford died as a result of strangulation. (*Id.* at 314.)

On April 21, 2008, the jury found Appellant guilty of second degree murder. (Tr., 878, Apr. 21, 2008.)

III.

RESPONSE TO ASSIGNMENTS OF ERROR

Appellant's assignments of error are quoted below, followed by the State's responses:

- A. THE TRIAL COURT ADMITTED THE DEFENDANT'S STATEMENT TO THE WEST VIRGINIA STATE TROOPERS INTO EVIDENCE AT TRIAL IN VIOLATION OF *STATE v. PERSINGER*, 169 W. Va. 121 (1982), WHICH RESULTED IN A DENIAL OF DEFENDANT'S CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL TRIAL AS GUARANTEED BY THE CONSTITUTION OF WEST VIRGINIA, ARTICLE 3, SECTION 10 AND 13, AND THE CONSTITUTION OF THE UNITED STATES, AMENDMENTS VI AND XIV.

State's Response:

There was no abuse of discretion on the part of the trial court in admitting Appellant's statement to the West Virginia State Police, and his constitutional rights were not violated. Whether such statements are voluntary or coerced is a matter for the fact-finder, and the circuit judge determined after hearing extensive testimony that it was voluntary.

- B. THE TRIAL COURT ERRED IN EXCLUDING TESTIMONY ON FALSE CONFESSIONS IN VIOLATION OF *CRANE v. KENTUCKY*, 476 U.S. 683 (1986), AND THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT WHICH RESULTED IN A DENIAL OF DEFENDANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

State's Response:

The circuit court did not violate *Crane v. Kentucky*, 476 U.S. 683, 106 S. Ct. 2142 (1986), nor deny Appellant his Due Process rights in excluding the expert testimony concerning false confessions since he did not make a confession and the circumstances surrounding the statement he made were admitted into evidence.

- C. THE TRIAL COURT ERRED IN EXCLUDING DEFENDANT'S REBUTTAL EVIDENCE CONSISTING OF TESTIMONY FROM THE OWNER OF YELLOW CAB WHICH DIRECTLY CONTRADICTED STATE WITNESS BRIAN DeMENT'S TESTIMONY.

State's Response:

There was no error on the part of the circuit court in excluding the testimony of the owner of Yellow Cab. The assertion that this testimony would have directly contradicted Brian DeMent's testimony is dubious at best, and its exclusion was a matter of discretion by the circuit court.

- D. THE TRIAL COURT ERRED IN STRIKING DEFENSE WITNESS JESSICA CARSON'S TESTIMONY FROM THE RECORD RULING IT WAS IRRELEVANT.

State's Response:

The circuit court did not abuse its discretion in excluding the testimony of Jessica Carson. This ruling was another exercise in the circuit court's sound discretion on an evidentiary matter. This testimony could have been excluded on the basis of West Virginia Rules of Evidence 402 or 403.

- E. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO CHANGE VENUE/VENIRE.

State's Response:

There was no abuse of discretion on the part of the circuit court in denying Appellant's motion to change venue/venire.

- F. THE PROSECUTING ATTORNEY FAILED TO DISCLOSE EXCULPATORY EVIDENCE TO THE DEFENSE PRIOR TO TRIAL.

State's Response:

There is absolutely no showing that the State failed to disclose exculpatory evidence to Appellant. There was simply no violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963).

- G. THE TRIAL COURT ERRED, IN VIOLATION OF WV RULE OF CRIMINAL PROCEDURE 12.1(b), IN DENYING THE DEFENSE'S MOTION TO EXCLUDE EVERY STATE WITNESS UPON WHOM THE STATE INTENDED TO RELY TO ESTABLISH THE DEFENDANT'S PRESENCE AT THE SCENE OF THE ALLEGED OFFENSE AND ANY OTHER WITNESS RELIED ON BY THE STATE OF WEST VIRGINIA TO REBUT TESTIMONY OF ANY OF THE DEFENDANT'S ALIBI WITNESSES.

State's Response:

West Virginia Rule of Criminal Procedure 12.1 is a permissive rule that the trial court may apply upon a party's non-compliance. Assuming Brian DeMent was a rebuttal witness to Appellant's alibi defense, no prejudice occurred, and the circuit court did not abuse its discretion in its ruling.

- H. THE TRIAL COURT ERRED IN PERMITTING THE STATE TO MAKE REFERENCE, IN ITS CLOSING ARGUMENT, TO INADMISSIBLE OUT OF COURT STATEMENTS BY STATE WITNESS BRIAN DEMENT IN VIOLATION OF THE COURT'S PREVIOUS RULINGS ON AUGUST 21, 2007.

State's Response:

There was no abuse of discretion in the circuit court's ruling regarding a reference by the State to statements Brian DeMent made to his uncle regarding the offense. Appellant misapplies both *Crawford v. Washington*, 541 U.S.36, 124 S. Ct. 1354 (2004), and *State v. Mullens*, 221 W. Va. 70, 650 S.E.2d 169 (2007), to the case at bar.

IV.

ARGUMENT

- A. **UPON WEIGHING THE EVIDENCE, THE STATEMENT APPELLANT GAVE TO THE STATE POLICE WAS NOT GIVEN AS A RESULT OF COERCION BUT WAS VOLUNTARY. THIS IS A PROPER ISSUE TO BE DETERMINED BY THE FACT-FINDER, AND THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION NOR VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS.**

The statement made to the State Police by Appellant was properly admitted into evidence at the trial. During the August 21, 2007, Suppression Hearing, testimony was given from both sides, and the circuit judge ruled that there was enough evidence to determine that the statement was voluntary rather than a result of police coercion. The determination as to whether a statement such as this is voluntary or coerced is a matter for the fact-finder; therefore, the circuit court did not abuse its discretion or violate Appellant's constitutional rights in admitting it.

1. **The Standard of Review.**

“Concerning our standard of review of the circuit court’s exclusion of the evidence at issue, we note that “[r]ulings on the admissibility of evidence are largely within a trial court’s sound discretion and should not be disturbed unless there has been an abuse of discretion.”

State v. Guthrie, 205 W. Va. 326, 332, 518 S.E.2d 83, 89 (1999), quoting *State v. Louk*, 171 W. Va. 639, 643, 301 S.E.2d 596, 599 (1983), citing Syl. Pt. 2, *State v. Peyatt*, 173 W. Va. 317, 315 S.E.2d 574 (1983).

“A trial court’s decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence.” Syl. Pt. 3, *State v. Vance*, 162 W. Va. 467, 250 S.E.2d 146 (1978).

Syl. Pt. 3, *State v. Williams*, 190 W. Va. 538, 438 S.E.2d 881 (1993).

2. After Extensive Testimony the Trial Judge Determined That Appellant's Statement to the West Virginia State Police Was Voluntary Rather Than Coerced. Therefore, the Evidence Was Properly Admitted.

Appellant's statement that he gave the West Virginia State Police at the Cabell County Detachment Center on or about January 29, 2007, was made voluntarily rather than as a result of police coercion. In light of this, the evidence was properly admitted at trial. Appellant is correct that coerced confessions are not admissible as evidence in a trial. Regarding coerced confessions, this Court held the following:

The fact that a defendant waives his right of self-incrimination and right to have counsel, which are the traditional Miranda rights, does not mean that thereafter the interrogating officers are free to extract a confession by any manner of inducement or coercion. Courts have recognized that confessions obtained through coercion or inducement are inadmissible even though a Miranda waiver has been given. E.g., *M.D.B. v. State*, 311 So.2d 399 (Fla. App. 1975); *State v. Setzer*, 20 Wash. App. 46, 579 P.2d 957 (1978); *State v. Davis*, 73 Wash.2d 271, 438 P.2d 185 (1968).

State v. Persinger, 169 W. Va. 121, 129, 286 S.E.3d 261, 272 (1982). However, there was ample evidence presented at the August 21, 2007, Suppression Hearing that no coercion took place regarding Appellant's statement. In *Persinger*, this Court also held the following:

"It is the mandatory duty of a trial court, whether requested or not, to hear the evidence and determine in the first instance, out of the presence of the jury, the voluntariness of an oral or written confession by an accused person prior to admitting the same into evidence." Syl. Pt. 1, *State v. Fortner*, 150 W. Va. 571, 148 S.E.2d 669 (1966), *overruled in part*, *State ex rel. White v. Mohn*, W. Va., 283 S.E.2d 914 (1981).

Id., Syl. Pt. 2. This is exactly what happened during this suppression hearing.

As stated previously, Trooper Kim Pack conducted the initial interview of Appellant at the Cabell County Detachment Center. Although it was not mentioned during the trial as is prohibited

by law, the interview with Trooper Pack was a polygraph test.¹ (Suppression Hr'g, 39, Aug. 21, 2007.) During the testimony of Trooper Pack at this hearing, the following exchange occurred:

Prosecutor: Is one of the first things you do when you do a polygraph, is go over their Miranda Rights with them?

Pack: Yes, it is.

Prosecutor: Did you do that in this case?

Pack: Yes, I did.

* * *

Prosecutor: When you went over Mr. Black's rights with him, was he handcuffed?

Pack: No, he was not.

Prosecutor: And did you tell him that he was free to leave?

Pack: Yes.

* * *

Prosecutor: Did you make any promises or inducements to get him to take it?

Pack: No, I did not.

* * *

Prosecutor: At any time during your interview with him, the test itself or the post-test interviews, did he indicate that he wanted to stop, wanted to leave, wanted a lawyer or anything?

Pack: No, he did not.

* * *

¹The first trial that took place on February 19, 2008, ended in a mistrial due to Trooper Pack mistakenly testifying to the jury that she conducted a polygraph test on Appellant at the Cabell County Detachment Center on the date in question. (Tr., 251-56, Feb. 19, 2008.)

Defense: You know that he was on parole?

Pack: Yes.

Defense: Okay, and you and he discussed that, didn't you?

Pack: I believe so.

Defense: Yeah.

Pack: Yeah.

Defense: And you indicated you would hate to see him get revoked?

Pack: I hate to see anybody get revoked. I don't know what you mean.

Defense: I'm saying— and you discussed with him and you told him that you would hate to see him get revoked from parole?

Pack: Sir, if he's on parole, we discussed him being on parole. I don't recall saying I hope he doesn't get revoked.

* * *

Defense: The question was, he amended his statement to you after you and he had discussed parole. Isn't that correct?

Pack: You got to understand, sir, if he's on parole, that's an issue for him from beginning to end. I understand that. So this issue of parole and whether he's revoked is not something that we an—it's a big elephant in the room. It's discussed. So did I sit there and say your parole is going to be revoked, this, that, and the other. I don't recall specifically saying that. But it was an issue for him, because he's on parole.

(Supp. Hr'g, 39-40, 45-46, and 52-53, Aug. 21, 2007.) Despite the fact that Trooper Pack spoke with Appellant about his status of being on parole in a more formal or procedural sense, there is no indication that she threatened him with revocation. In fact, she repeatedly denied doing so. Consistent with Trooper Pack's testimony, Sergeant Cummings repeatedly testified at this hearing

that Appellant was free to leave at any time and was not under arrest. (*Id.* at 19-23.) Additionally, the sergeant testified that he made no promises to Appellant to get him to give a statement, nor did he remember discussing parole. (*Id.* at 35-38.) Further, Corporal Parde testified regarding the statement that he obtained from Appellant that the latter was free to leave at any time, he made no promises or threats to induce a statement and no threats from others were made in his presence. (*Id.* at 57-58.)

Appellant did testify that the State Police threatened him with parole revocation. (*Id.* at 75.) However, this issue is a matter to be determined by the fact-finder, in accordance with *Guthrie, supra*, and *Williams, supra*. Additionally, this Court held the following regarding determinations of a statement or confession being voluntary or coerced:

“This Court is constitutionally obligated to give plenary, independent, and de novo review to the ultimate question of whether a particular confession is voluntary and whether the lower court applied the correct legal standard in making its determination. The holdings of prior West Virginia cases suggesting deference in this area continue, but that deference is limited to factual findings as opposed to legal conclusions.” Syl. Pt. 2, *State v. Farley*, 192 W.Va. 247, 452 S.E.2d 50 (1994).

Syl. Pt. 1, *State v. Boxley*, 201 W. Va. 292, 496 S.E.2d 242 (1997). This issue was a matter to be determined by the circuit judge in this hearing, and he ruled that the statement given was voluntary rather than coerced. (Supp. Hr’g, 92-93, Aug. 21, 2007.) In ruling the statement admissible, the circuit judge stated the following:

There is very ample evidence in the criteria of by a preponderance of the evidence as to admissibility that the statements given by Mr. Black are freely and voluntarily given. There is his testimony as to possible threats about revocation of parole. His statements which differ greatly from the trooper’s statements in regard to any coercion. There are other factors that highly indicate they did not consider anything—I don’t know what—why they did or did not arrest him at that time. Apparently from Mr.— I believe it was Lockwood’s last question, he never stated to taking part, but being present at the scene. So that may have been a reason for not

arresting him. But there's really not much question in the Court's mind as to whether it's a custodial interrogation. I believe it was not.

There are matters of credibility that he can testify to the jury as to the admissibility—as to whether to believe it was a coerced or involuntary statement. But as far as the admissibility of the statement, the Court rules it is admissible or the statements, and that's enough. They're all set for September 4th.

(*Id.*) This was a decision made by the fact-finder that the statement was voluntary based on a preponderance of the evidence when weighing all the testimony given in the hearing in accordance with *Williams, supra*, and *Boxley, supra*.

In using the standard of review established in *Guthrie, supra*, there was no abuse of discretion on the part of the circuit court. Therefore, Appellant's constitutional rights were not violated. In light of this, Appellant's argument fails.

B. THE EXCLUSION OF THE EXPERT TESTIMONY OF DR. BOBBY MILLER DID NOT VIOLATE *CRANE v. KENTUCKY*, 476 U.S. 683, 106 S. Ct. 2142 (1986), NOR DENY APPELLANT HIS DUE PROCESS RIGHTS. APPELLANT WAS ABLE TO TESTIFY AS TO THE CREDIBILITY OF HIS STATEMENT TO THE STATE POLICE, AND THE RULING OF THIS UNITED STATES SUPREME COURT CASE IS INAPPLICABLE HERE.

The United States Supreme Court holding in *Crane, supra*, was not violated by the circuit court's decision to exclude the testimony of forensic psychiatrist Bobby Miller, M.D. Thus, Appellant was not denied his Due Process rights. The case is distinguishable from the present one. Appellant never made a confession as did the defendant in *Crane*. Additionally, the circumstances surrounding Appellant giving a statement to the West Virginia State Police was admitted into evidence. The exclusion of the expert testimony was a proper use of the circuit court's discretion.

1. **The Standard of Review.**

“The admissibility of testimony by an expert witness is a matter within the sound discretion of the trial court, and the trial court's decision will not be reversed unless it is clearly wrong.” Syl. pt. 6, *Helmick v. Potomac Edison Co.*, 185 W.Va. 269, 406 S.E.2d 700, *cert denied*, 502 U.S. 908, 112 S. Ct. 301, 116 L. Ed. 2d 244 (1991).

Syl. Pt. 3, *State ex. rel. Jones v. Recht*, 221 W. Va. 380, 655 S.E.2d 126 (2007).

2. **There Was No Violation of Crane Nor of Appellant's Due Process Rights in the Exclusion of the Testimony of Dr. Bobby Miller, but Rather a Proper Use of the Circuit Court's Discretion Regarding the Admissibility of Expert Testimony.**

Appellant misapplies the United States Supreme Court holding of *Crane, supra*, in asserting that the circuit court denied his Due Process rights by excluding the expert testimony of Dr. Bobby Miller regarding his statement to the West Virginia State Police. He wrongly contends that this ruling denied him the ability to present his defense by excluding Dr. Miller's testimony regarding false confessions. Appellant correctly cites *Crane* in his contention that one should not be denied the ability to present the evidence of the circumstances surrounding a confession in order to cast doubt on its credibility in presenting his defense. Specifically, the United States Supreme Court held the following in *Crane*:

Accordingly, regardless of whether the defendant marshaled the same evidence either in support of an unsuccessful motion to suppress, and entirely independent of any question of voluntariness, a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility.

Id., 476 U.S. at 689, 106 S. Ct. at 2146. However, in *Crane*, the trial court excluded all testimony regarding the circumstances surrounding the defendant's confession as opposed to the exclusion of expert testimony with respect to false confessions. *Id.*, 476 U.S. at 685-86, 106 S. Ct. at 2144.

Conversely, in the case at bar, Appellant was permitted to introduce all evidence in the form of his testimony regarding the circumstances surrounding his statement on or about January 29, 2007, to the State Police, including his allegations of coercion. Additionally and unlike the situation in *Crane*, there was no confession by Appellant. He did give a statement that put him in a car with the victim and the other assailants that located him near where the offense occurred, yet he never confessed to any involvement.

Similar to the instant case, the Eighth Circuit Court of Appeals in *Greer v. Minnesota*, 493 F.3d 952, 959-60 (8th Cir. 2007), distinguished *Crane*, and upheld the trial court's decision to limit evidence surrounding the defendant's confession to the circumstances as to why he confessed to the Detroit police at the scene and excluded testimony deemed marginally relevant such as hearing a police report that shots were fired near where his friends lived and his past experiences with that police force. Thus, despite the fact that Appellant's statement was not even a confession, the circuit court's limiting testimony regarding it was no *Crane* violation. Regarding the exclusion of Dr. Miller's testimony, the trial judge ruled as follows:

This is not a confession you are asking Dr. Miller to testify to. At the most it is a statement that is against the interest of the defendant. To allow him to testify about confessions in this matter would, I think, be very confusing to the jury.

Further, this testimony does not come up to any standard of reliability as far as scientific testing go [*sic*], so the testimony of Dr. Miller will be excluded in this regard.

(Tr., 4, Feb. 19, 2008.)

It is worth noting that the trial judge mentioned juror confusion regarding the admission of Dr. Miller's testimony. This could clearly be a proper exercise of the exclusion of evidence under West Virginia Rule of Evidence 403. According to Rule 403,

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, *confusion of the issues*, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(Emphasis added.)

In light of all of this, the circuit court did not violate *Crane, supra*, and deny Appellant his Due Process rights in excluding this expert testimony. Thus, Appellant's argument fails.

C. THE CIRCUIT COURT DID NOT ERR IN EXCLUDING THE TESTIMONY OF THE OWNER OF YELLOW CAB, BUT RATHER EXERCISED PROPER AUTHORITY UNDER ITS DISCRETION.

There was no abuse of discretion in the circuit court ruling to exclude Appellant's rebuttal testimony of the owner of Yellow Cab. His testimony that he instructs employees not to service the area where the offense occurred being a direct contradiction to Brian DeMent's testimony is unlikely. If anything, this testimony seems to be more evidence to be excluded on West Virginia Rule of Evidence 403 grounds. This decision was within the sound discretion of the circuit court.

1. The Standard of Review.

“Concerning our standard of review of the circuit court's exclusion of the evidence at issue, we note that “[r]ulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion.””

State v. Guthrie, 205 W. Va. at 332, 518 S.E.2d at 89, quoting *State v. Louk*, 171 W. Va. at 643, 301 S.E.2d at 599, citing Syl. Pt. 2, *State v. Peyatt, supra*.

2. **There Was No Abuse of Discretion on the Part of the Circuit Court Regarding the Decision to Exclude the Testimony of the Owner of Yellow Cab as a Rebuttal Witness for Appellant. This Testimony Was of Very Little Value. If There Was Any at All, to Contradict the Testimony of Brian DeMent, and Its Exclusion Was a Matter of Discretion on the Part of the Circuit Court.**

Appellant wrongly contends that the circuit court erred in excluding the testimony of Jamie Malone, owner of Yellow Cab in Huntington. It is Appellant's contention that Mr. Malone would directly contradict the testimony of Brian DeMent. Specifically, Mr. DeMent testified that he left the area where the beating took place, walked to Morrison's Market on Route 10 and called a cab, which took him to his Uncle Jimmy's house. (Tr. 441-42, Apr. 17, 2008.)

According to Appellant's counsel, Mr. Malone was to be brought on as a rebuttal witness to testify that it was his policy not to send cabs to that area at that time because of a shooting that occurred. (Tr., 769-70, Apr. 18, 2008.) However, this is a peripheral issue where its value seems highly questionable. There could be numerous reasons as to why, despite this policy, Mr. DeMent did indeed obtain a cab ride from Morrison's Market: the dispatcher on that night in question could have ignored this policy, the cab driver could have picked Mr. DeMent up anyway once he or she heard about the call, and both the cab driver and dispatcher could have been confused with respect to the address and territory from which they were not to pick up potential customers, among many other explanations.

The circuit judge excluded the testimony because Appellant's counsel did not give notice to the State regarding this witness upon objection. (*Id.* at 771-73.) It is worth noting that Appellant cites absolutely no rule, statutory provision or case law as to its assertion that the circuit court committed error. Regarding this neglect, this Court has held, "Although we liberally construe briefs

in determining issues presented for review, issues which are not raised, and those mentioned only in passing but are not supported with pertinent authority, are not considered on appeal.” *State v. LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996).

Regardless, the State asserts that this rebuttal testimony is another example of evidence that can be excluded on West Virginia Rule of Evidence 403 grounds. Again, Rule 403 states,

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, *confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.*

(Emphasis added.) Due to the peripheral nature of this evidence and its value being highly suspect in order to contradict Mr. DeMent’s testimony for the potential reasons presented above, this could have been excluded for being confusing to the jury, causing undue delay or amounting to a waste of time. Thus, Rule 403 is indeed applicable, and there was no abuse of discretion as established in *Guthrie, supra*, on the part of the circuit court.

In light of this, Appellant’s argument fails on this ground.

D. THERE WAS NO ABUSE OF DISCRETION ON THE PART OF THE CIRCUIT COURT IN EXCLUDING THE TESTIMONY OF JESSICA CARSON. IT WAS WELL WITHIN ITS BROAD DISCRETION TO EXCLUDE IT ACCORDING TO THE WEST VIRGINIA RULES OF EVIDENCE.

Appellant incorrectly asserts that the circuit court erred in excluding the testimony of Jessica Carson. However, this decision was within the broad discretion of the circuit court. The State’s motion to exclude the testimony was correctly granted on the basis that it was irrelevant. Alternatively, it could have been excluded on the basis of West Virginia Rule of Evidence 403 as

is the case with the previous evidentiary rulings. Regardless, there was no abuse of discretion by the circuit court regarding this evidentiary matter.

1. **The Standard of Review.**

“Concerning our standard of review of the circuit court’s exclusion of the evidence at issue, we note that “[r]ulings on the admissibility of evidence are largely within a trial court’s sound discretion and should not be disturbed unless there has been an abuse of discretion.””

State v. Guthrie, 205 W. Va. at 332, 518 S.E.2d at 89, quoting *State v. Louk*, 171 W. Va. at 643, 301 S.E.2d at 599, citing Syl. Pt. 2, *State v. Peyatt*, *supra*.

2. **As With the Issue of the Jamie Malone Testimony, the Circuit Court Decision to Exclude this Evidence Was An Exercise Within Its Sound Discretion And No Abuse Occurred.**

Appellant wrongfully contends that the circuit court erred in striking the testimony of Jessica Carson. Somehow, Appellant obtained Ms. Carson as a witness, a drug addict who had a sexual relationship with a man that allegedly lived in the area where the offense occurred named Jason Thompson; where the sexual relationship apparently was one that could be characterized as the engagement of “rough sex.” Specifically, Ms. Carson testified that some strangulation occurred toward her during sex. (Tr., 660, Apr. 18, 2008.) However, contrasting this with the violent death of Deanna Crawford, Ms. Carson testified that she was the one who asked for and chose this form of sexual activity. (*Id.* at 663.) Additionally, she testified that he would choke her but would not hurt her or “go too far” with this endeavor. (*Id.* at 661, 664.) Further, Ms. Carson testified that there were other sexual partners that she had that engaged in this behavior with her. (*Id.* at 664.) It is also worth noting that Ms. Carson testified that she knew of the spot where the victim was found and stated that she never had sex with Jason at that exact spot. (*Id.* at 661.) Appellant also goes out of

his way to point out that Ms. Carson testified that at times during sexual encounters, she left her top on; the same clothing pattern as Ms. Crawford was found. (*Id.*) However, this seems to lack anything in real value as an evidentiary matter. Without getting into great detail regarding sexual activity, it is probably not hard to fathom that many sexual partners are not always fully naked when engaging in such endeavors. With all of this testimony, it is worth noting that there was no evidence presented regarding the medical examination of Ms. Crawford of any sexual activity.

Defense witness Sherrie Faulkner also testified that she saw a woman in a black top get in a red truck with someone near her house, which was in the general area of the murder scene. (*Id.* at 644-47.) However, there was nothing developed through this testimony that the person Ms. Faulkner saw get in this truck was indeed Deanna Crawford. A black top as described here could be considered typical summer wear for females in this area that is known as a popular party scene for younger people. Ms. Faulkner never identified this person who was picked up in the red truck as being Deanna Crawford. Even if it was her that was picked up by Mr. Thompson, there was no other evidence linking him to the crime scene or the offense that occurred against Ms. Crawford.

The State moved to have Ms. Carson's testimony stricken on the basis that it was irrelevant to the case, and the circuit court granted the same. (*Id.* at 665-67.) This was a proper evidentiary ruling by the circuit court on the basis of West Virginia Rule of Evidence 402. According to Rule 402,

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of West Virginia, by these rules, or by other rules adopted by the Supreme Court of Appeals. Evidence which is not relevant is not admissible.

As stated above, there was ample evidence and arguments behind the assertion that the Carson testimony was irrelevant to the case at bar. It appears that Appellant was attempting to reach for any evidence that would go to some other theory of Ms. Crawford's murder. There was definitely no abuse of discretion on the part of the trial court in making this decision.

In the alternative, this testimony could have been stricken on the basis of Rule 403. The argument could be made that this testimony was merely evidence that would confuse the jury.

Although Appellant contends that this testimony is relevant to this case, as in his previous argument, he again cites no rule, statutory provision or case law as to why the circuit court erred. Thus, this seems to be another issue mentioned in passing with no authority that need not be addressed on appeal as was held in *LaRock, supra*.

In light of all of this, there was no abuse of discretion as established in *Guthrie, supra*, and the circuit court was well within its discretion in its ruling on this evidentiary matter. Thus, Appellant's argument fails on this ground.

E. THE CIRCUIT COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO CHANGE VENUE/VENIRE. DESPITE THIS CASE BEING REPORTED IN THE MEDIA, VIRTUALLY NO PROSPECTIVE JUROR HAD HEARD OF IT WHEN QUESTIONED, AND THOSE THAT HAD READ ABOUT THE CASE ONCE PROCEEDINGS HAD COMMENCED WERE EXCUSED FOR CAUSE. THERE WAS ABSOLUTELY NO REASON TO BELIEVE THERE WAS ANY BIAS AGAINST APPELLANT WITH THIS PANEL.

Despite Appellant's assertion that the circuit court erred in denying his motion to change venue/venire, there was no grounds for this. His justification for this motion falls short of the standard where jurors have such a fixed opinion that they cannot be impartial. The circuit court in

no way abused its discretion. Virtually all prospective jurors had no knowledge of the case, and the trial judge removed those who had read about it.

1. **The Standard of Review.**

“To warrant a change of venue in a criminal case, there must be a showing of good cause therefor, the burden of which rests upon defendant, the only person who, in any such case, is entitled to a change of venue. The good cause aforesaid must exist at the time application for a change of venue is made. Whether, on the showing made, a change of venue will be ordered, rests in the sound discretion of the trial court; and its ruling thereon will not be disturbed, unless it clearly appears that the discretion aforesaid has been abused.” Syl. Pt. 2, *State v. Wooldridge*, 129 W. Va. 448, 40 S.E.2d 899 (1946).

Syl. Pt. 1, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994); Syl. Pt. 4, *State v. Horton*, 203 W. Va. 9, 506 S.E.2d 46 (1998).

2. **There Was No Grounds to Grant Appellant’s Motion to Change Venue/Venire, and the Circuit Court Did Not Abuse Its Discretion in Denying It.**

Appellant asserts that the circuit court erred in denying his motion for change of venue/venire. However, this claim is completely without merit. In his argument, Appellant makes the dubious contention that three on-line articles from Cabell County that discussed the earlier mistrial and the mention of the polygraph test—one on herald-dispatch.com and two on wowktv.com—were cause to change venue due to hostile sentiment toward him. The circuit court denied this motion in an order filed April 22, 2008. (R. at 226.) As an initial consideration, it is very unlikely that three on-line articles would cause widespread ill-will and negative sentiment toward Appellant warranting a change of venue.

On the first day before the trial commenced, the circuit judge asked every prospective juror individually if they knew anything about the case or had read anything about it. (Tr., 10-38, Apr. 15,

2008.) With a couple exceptions, no prospective juror had heard or read anything about the case. (*Id.*) Juror Andrews stated that he knew about the charges from reading articles in the newspaper. Due to this response, the prosecutor asked him if there would be anything that would prevent him from being fair and impartial, to which Juror Andrews said no. (*Id.* at 19-20.) In response to the question of whether he knew or heard anything about the case, Juror Anderson said, “I think I seen [*sic*] it on the news once or twice.” (*Id.* at 22.) Upon further probing, the prospective juror stated that there was a girl that was murdered in Salt Rock, but he knew nothing more and never mentioned any knowledge about Appellant or the previous trial. (*Id.* at 23.) This prospective juror said he thought he knew Brian DeMent because he was a manager of a McDonald’s and he thought the witness might have worked there years ago. However, he said that he had no connection to Mr. DeMent. (*Id.*)

Jurors McCallister and Lucas said that they had read about the case in the local paper that morning. (*Id.* at 34, 39.) The trial judge excused both of them. (*Id.* at 36, 42.)

Using the standard established in *Derr, supra*, and *Horton, supra*, there was no abuse of discretion on the part of the circuit court in denying Appellant’s motion. The trial judge asked each prospective juror individually if they read or had knowledge about the case. All who said that they knew nothing and read nothing about the case were kept on the panel. Juror Andrews indicated that he read something about the case, and was kept on when he clearly stated that he could be fair and unbiased. Juror Anderson was kept on when he said he saw something on the news about it, yet he had no knowledge of Appellant. The two jurors that read about the case from an article in the local newspaper that day were excused.

As Appellant correctly cites, this Court in Syllabus Point 3 of *Derr, supra*, held the following:

“One of the inquiries on a motion for a change of venue should not be whether the community remembered or heard the facts of the case, but whether the jurors had such fixed opinion that they could not judge impartially the guilt or innocence of the defendant.”

The prospective jurors that said they knew nothing and had read nothing of the case could not have had any fixed opinion that would cause them not to be impartial regarding Appellant. The one prospective juror who had some knowledge due to seeing something on the news was asked about potential bias as directed by *Derr, supra*, to which he replied that he could be impartial.

Appellant makes a claim that he could not go into the community to interview people to determine any hostile sentiment regarding him because it would spread news about the polygraph test. This seems to be a puzzling argument. If one were to go into the community interviewing people about the case, it seems that many would eventually have knowledge about the case; and depending on the degree of probing the residents, have knowledge about the polygraph. However, it is very unlikely that there was such widespread poor sentiment in the community regarding Appellant due to three on-line articles whereby the circuit court abused its discretion by denying a motion to change venue.

In light of this, the circuit court was well within its sound discretion to deny the motion. Thus, Appellant’s argument fails.

F. THERE IS NO EVIDENCE THAT THIS ONE STATEMENT MADE IN PASSING BY ALICIA WIBBLING DURING REDIRECT EXAMINATION AMOUNTED TO EXCULPATORY EVIDENCE WITHHELD BY THE STATE IN VIOLATION OF *BRADY, SUPRA*.

An ambiguous comment was made by Alicia Wibbling during her redirect examination concerning someone named "Punkin," which Appellant characterizes as exculpatory evidence that was not disclosed to him, amounting to a *Brady* violation. However, there is absolutely no indication that this reference was exculpatory in any way. In fact, this "Punkin" that was mentioned could have even been referring to Appellant. Regardless, there is no proof that the State failed to disclose exculpatory evidence to him.

1. The Standard of Review.

A *Brady* violation occurs when the government fails to disclose evidence materially favorable to the accused. *See* 373 U.S. at 87, 83 S.Ct. 1194. This Court has held that the *Brady* duty extends to impeachment evidence as well as exculpatory evidence, *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), and *Brady* suppression occurs when the government fails to turn over even evidence that is "known only to police investigators and not to the prosecutor," *Kyles [v. Whitley]*, 514 U.S. [419] at 438, 115 S.Ct. 1555. *See id.*, at 437, 115 S.Ct. 1555 ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"). "Such evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,'" *Strickler v. Greene*, 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (quoting *Bagley, supra*, at 682, 105 S.Ct. 3375 (opinion of Blackmun, J.)), although a "showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal," *Kyles*, 514 U.S., at 434, 115 S.Ct. 1555. The reversal of a conviction is required upon a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.*, at 435, 115 S.Ct. 1555.

Youngblood v. West Virginia, 547 U.S. 867, 869, 126 S. Ct. 2188, 2190 (2006).

2. Alicia Wibbling's Brief Mention of a Person Named "Punkin" Did Not Amount to Exculpatory Evidence Which the State Failed to Disclose in Violation of *Youngblood*.

Appellant takes one statement made by Alicia Wibbling during the State's redirect examination of her and makes the assertion that there was exculpatory evidence which was not turned over to him by the prosecution in violation of *Brady, supra*. Appellant is correct that the United States Supreme Court held in *Youngblood* that the State has a duty to disclose all exculpatory evidence even in the form of impeachment evidence that is known to the government, and even if unknown to the prosecutor. *Youngblood* further held that such failure to disclose requires a reversal of a conviction. However, this statement in no way falls under this category of evidence requiring a disclosure by the State. At most, this evidence seems to be an ambiguous statement made by Ms. Wibbling.

During the redirect examination of Ms. Wibbling, the following exchange occurred between her and the prosecutor:

Prosecutor: Did you tell us that?

Ms. Wibbling: I also said that—that you asked me a question about me being at Punkin's house and the guy was crying in his beer about killing Deanna.

Prosecutor: Right. I asked you a lot of different things. But you told me and Sergeant Cummings—you told him back in February and you told both of us just at noon that you remembered when Deanna's body was found. And part of what you remember was you had just seen her at Vetina's [Appellant's mother] party a few days before that, didn't you?

(Tr., 578-79, Apr. 17, 2008.) Despite Appellant's contention, this was in no way a *Brady* violation by the State. There was no mention of any "Punkin" in the rest of her testimony or elsewhere in the

trial. It is unclear in this exchange who exactly “Punkin” is, but this in no way amounts to exculpatory or even impeachment evidence. During her direct examination, Ms. Wibbling testified that she used to date Phillip Barnett. (*Id.* at 560.) “Punkin” could very well have been her former boyfriend. Additionally, she testified that she was good friends with Vetina Baylous, Appellant’s mother. (*Id.* at 560, 569.) These parties Appellant had at the time were at his mother’s house where he was residing. “Punkin” could very well have been a term of endearment for her friend Vetina’s son, whose parties she attended. It is worth keeping in mind that Appellant, Brian DeMent, Phillip Barnett, and Nathan Barnett were all implicated in this crime. No other male is discussed in Ms. Wibbling’s testimony. It is also worth noting that Appellant’s counsel does not bring this issue out at all during the trial, nor does he cite any other mention of this person in his Appellant Brief. It is unclear as to who “Punkin” is, yet this mere mention in passing amounting to a *Brady* violation going against the holding of *Youngblood*, *supra*, seems very dubious. In *Youngblood*, the United States Supreme Court reversed the conviction where the State withheld and destroyed a note of an alleged victim of sexual assault that supported the defendant’s consent defense. *Id.*, 547 U.S. at 868-69, 126 S. Ct. at 2189. This reference to a “Punkin” is clearly distinguishable.

In light of this, Appellant’s argument fails on this ground.

G. THE CIRCUIT COURT DID NOT ERR IN DENYING APPELLANT’S MOTION TO EXCLUDE EVERY WITNESS THE STATE INTENDED TO USE TO ESTABLISH HIS PRESENCE AT THE SCENE OF THE OFFENSE. EVEN IF THERE WAS A TECHNICAL VIOLATION OF RULE 12.1(b) OF THE WEST VIRGINIA RULES OF CRIMINAL PROCEDURE, THERE WAS NO PREJUDICE, AND THE CIRCUIT COURT USED ITS SOUND DISCRETION IN APPLYING THIS RULE.

Appellant asserts that Mr. DeMent was a rebuttal witness used by the State to rebut an alibi defense; and, in turn, there was a violation of West Virginia Rule of Criminal Procedure 12.1(b). The

case may be made that Brian DeMent was not a rebuttal witness since he was utilized in the State's case-in-chief. However, though it appears there was a technical violation of this rule, Rule 12.1 is a permissive one rather than a mandatory requirement striking of testimony upon noncompliance. It is a discovery measure within the sound discretion of the trial court. There was no prejudice against Appellant due to the apparent technical violation. Therefore, there was no abuse of discretion with respect to the circuit court decision.

1. **The Standard of Review.**

“Concerning our standard of review of the circuit court’s exclusion of the evidence at issue, we note that “[r]ulings on the admissibility of evidence are largely within a trial court’s sound discretion and should not be disturbed unless there has been an abuse of discretion.””

State v. Guthrie, 205 W. Va. at 332, 518 S.E.2d at 89, quoting *State v. Louk*, 171 W. Va. at 643, 301 S.E.2d at 599, citing Syl. Pt. 2, *State v. Peyatt*, *supra*.

2. **There Was No Abuse of Discretion On the Part of the Circuit Court In Denying this Motion. Rule 12.1 Is a Permissive Rule Where the State May Exclude Testimony upon Noncompliance.**

Appellant contends that Brian DeMent was a rebuttal witness used by the State to rebut alibi testimony in his defense. Using this argument, Appellant asserts that the State violated West Virginia Rule of Criminal Procedure 12.1(b) in not giving a specific date and time as to when the offense in question occurred. Additionally, Appellant argues that the circuit court erred in denying his motion to exclude all testimony by witnesses that placed him at the crime scene due to this. However, Appellant misapplies Rule 12.1. This rule provides that it may strike witness testimony when there is noncompliance. The circuit court was within its sound discretion in denying this Motion to Exclude.

According to Rule 12.1,

(a) Notice by Defendant. Upon written demand of the attorney for the state stating the time, date and place at which the alleged offense was committed, the defendant shall serve within 10 days, or at such different time as the court may direct, upon the attorney for the state a written notice of the defendant's intention to offer a defense of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi.

(b) Disclosure of Information and Witness. Within 10 days thereafter, but in no event less than 10 days before trial, unless the court otherwise directs, the attorney for the state shall serve upon the defendant or the defendant's attorney a written notice stating the names and addresses of the witnesses upon whom the state intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

Appellant did give notice for alibi witnesses. (R. at 93.) The State did provide a witness list in accordance with West Virginia Rule of Criminal Procedure 16(a). With regard to the two rebuttal witnesses used by the State in the trial, Vetina Baylous and Sergeant Tony Cummings, the prosecutor disclosed their names and addresses in his witness list. (*See* Appendix to Motion to Supplement the Record.)

However, regarding the "specific time and date of the offense," Appellant had notice from the beginning of the proceedings that this was as practicable a time frame that could be given. With Ms. Baylous' listing, the date of August 5, 2002, is mentioned (*See id.*) The indictment stated that the offense took place sometime on or about August 4, 2002, to August 8, 2002. (R. at 1.) Brian DeMent testified that the evening in question could have been in August, but did not take place toward the end of July of 2002. (Tr., 466-67, Apr. 17, 2008.) As the State pointed out in its Response to Motion to Exclude, it provided Appellant with a CD which showed a person believed

to be the victim on a store camera sometime between the evening of August 3, 2002, and the early morning of August 4, 2002. (R. at 153.) Deanna Crawford's body was found on August 8, 2002. (Tr., 149-50, Apr. 15, 2008.) According to Dr. Mahoud, by examining the amount of the body's decomposition, he estimated she had died two to three days prior to the discovery. (Tr., 316, Apr. 16, 2008.) The problem is, as the State again pointed out in its Response to Motion to Exclude, it had no way to provide with any more specificity the date or time of the murder, and it disclosed to Appellant with as much specificity as possible the date and location. (R. at 155.)

Appellant cites a treatise entitled *Cleckley on West Virginia Criminal Procedure*, I-737, which states that the State is to disclose the specific time and date of the alleged offense when a defendant gives notice of alibi defense. (See Appellant's Brief at 20-21.) It is worth noting that this is persuasive authority only, and Appellant cites no rule, statute or court holding where this specific interpretation of Rule 12.1(b) has been adopted.

The State does not have a transcript of the February 12, 2008, Motion Hearing Appellant refers to because the latter did not have it transcribed. However, Appellant was well aware that Brian DeMent had pled guilty to second degree murder and promised to testify against the latter in a hearing in September of 2007. (See Appellant Brief at 3.)

The State disclosed its intent to call Brian DeMent as a witness in its case-in-chief in an Updated Witness List filed on February 12, 2008. (R. at 59.) The argument could be made that Brian DeMent was not a rebuttal witness to Appellant's alibi defense because Mr. DeMent was used in the State's case-in-chief. For argument's sake, the State will accept Appellant's claim that Mr. DeMent was a rebuttal witness to alibi testimony. Although the State technically disclosed this less than ten days before the initial trial of February 19, 2008, in violation of Rule 12.1(b), Appellant had notice

well in advance of the second trial that commenced on April 15, 2008, due to the previous mistrial. Appellant was well aware of Mr. DeMent's address at the regional jail. This is made evident by Mr. DeMent's testimony that one or more of Appellant's defense attorneys visited him there four to five times. (Tr., 450, Apr. 17, 2008.)

However, this is not grounds for reversal. According to West Virginia Rule of Criminal Procedure 12.1(d) and (e),

(d) Failure to Comply. Upon the failure of either party to comply with the requirements of this rule, the court *may* exclude the testimony of an undisclosed witness offered by such party as to the defendant's absence from or presence at the scene of the alleged offense. This rule shall not limit the right of the defendant to testify.

(e) Exceptions. For good cause shown, the court *may grant an exception* to any of the requirements of subdivisions (a) through (d) of this rule.

(Emphasis added.) As this Court will note, Rule 12.1 is a permissive rule and is not mandatory according to these provisions. The circuit court may exclude testimony upon noncompliance and may waive the rule's requirements. It is up to the discretion of the circuit court. Regarding discovery, this Court has held the following:

"Subject to certain exceptions, pretrial discovery in a criminal case is within the sound discretion of the trial court." Syllabus Point 8, *State v. Audia*, 171 W. Va. 568, 301 S.E.2d 199, *cert. denied*, 464 U.S. 934, 104 S. Ct. 338, 78 L. Ed. 2d 307 (1983).

Syl. Pt. 4, *State v. Miller*, 195 W. Va. 656, 466 S.E.2d 507 (1995). In *Miller*, this Court held that the trial court did not abuse its discretion in allowing the State's rebuttal witness to testify as to the date of defendant's residence in the county contrary to the alibi defense, despite the State's failure to disclose the rebuttal witness during discovery, in light of the defendant's failure to seek recess or continuance at trial suggesting the defendant was not surprised by the witness' testimony; the defense

made several references to the defendant's residence and, thus, should not have been surprised by the State's attempt to address same the issue. *Id.* at 670, 466 S.E.2d at 521. Although the Court in *Miller* examined the discovery matter on the basis of West Virginia Rule of Criminal Procedure 16, it held the following concerning prejudice:

“The traditional appellate standard for determining prejudice for discovery violation under Rule 16 of the West Virginia Rules of Criminal Procedure involves a two-pronged analysis: (1) did the non-disclosure surprise the defendant on a material fact, and (2) did it hamper the preparation and presentation of the defendant's case.” Syl. Pt. 2, *State ex rel. Rusen v. Hill*, 193 W. Va. 133, 454 S.E.2d 427 (1994).

Syl. Pt. 6, *Miller*. As has been established, there was no surprise regarding a material fact, and this did not hamper Appellant's preparation and presentation of his case.

As stated repeatedly, the standard of review according to *Guthrie, supra*, is an abuse of discretion on the part of the trial court in order to warrant a reversal. It is clear from all of this that there was no such abuse of discretion in the circuit court's denying Appellant's motion. Therefore, Appellant's argument fails on this ground.

H. THERE WAS NO ABUSE OF DISCRETION IN THE CIRCUIT COURT ALLOWING THE STATE TO MAKE A REFERENCE TO THE STATEMENT MADE BY BRIAN DeMENT TO HIS UNCLE REGARDING THE CRIME. APPELLANT MISAPPLIES *CRAWFORD* AND *MULLENS* IN MAKING THE ARGUMENT THAT THIS CONSTITUTED REVERSIBLE ERROR.

1. The Standard of Review.

“In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's

underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.” Syl. Pt. 3, *State v. Vance*, 207 W.Va. 640, 535 S.E.2d 484 (2000).

Syl. Pt. 2. *State v. Keesecker*, 222 W. Va. 138, 663 S.E.2d 593 (2008).

2. **Appellant Fails To Meet the Standard To Establish That the Circuit Court Abused Its Discretion Regarding the Reference Made By the State During Closing Argument. No Violation of Crawford or Mullens Occurred.**

Appellant contends that the circuit court erred in allowing a reference made by the prosecution to statements by Brian DeMent to his uncle regarding the offense in question during the State’s closing argument. Specifically, Appellant asserts that this was a violation of *Crawford, supra*, and *Mullens, supra*. This is not the case, however.

The reference made by the State that Appellant challenges its admission and the accompanying exchange are as follows:

Prosecutor: But the other thing to keep in mind is the reason why they [police] came to Brian DeMent was because Brian DeMent had already been telling his uncle, Greg Baily, about his involved [*sic*] in that matter.

Defense: Objection, Your Honor.

Court: Sustained.

Prosecutor: It’s in the statement. It’s in the statement played for the jury.

Court: The correct thing is the— the jury will recall.

Prosecutor: It’s in the statement.

Court: Will recall whichever.

Defense: Which is not in evidence, Your Honor.

Court: One, don’t argue. Will recall how the testimony is.

Prosecutor: The same statement that they want you to rely on to show Brian DeMent's lying and not to be believed, in the same statement to Mr. Cook, he said—

Defense: Objection. If he's going to make a reference to that, he can't.

Court: Overruled.

Defense: Your honor, it was redacted.

Court: Overruled. One minute added on.

(Tr., 865-66, Apr. 21, 2008.) Appellant asserts that the circuit court erred for allowing this reference due to the judge's prior order in Brian DeMent's suppression hearing on August 21, 2007, and later in Phillip Barnett's hearing that same day. The statements to be suppressed were those made by Mr. DeMent in his home and in a vehicle without his consent or knowledge of the recording. (See Appellant's Brief at 23.)

Such statements made by Mr. DeMent in his own case were correctly suppressed on the basis of *Mullens, supra*. According to the holding in that case,

It is a violation of West Virginia Constitution article III, § 6 for the police to invade the privacy and sanctity of a person's home by employing an informant to surreptitiously use an electronic surveillance device to record matters occurring in that person's home without first obtaining a duly authorized court order pursuant to W. Va. Code § 62-1D-11 (1987) (Repl. Vol. 2005). To the extent that *State v. Thompson*, 176 W.Va. 300, 342 S.E.2d 268 (1986), holds differently, it is overruled.

Article III, § 6 of the West Virginia Constitution prohibits the police from sending an informant into the home of another person under the auspices of the one-party consent to electronic surveillance provisions of W. Va. Code § 62-1D-3(b)(2) (1987) (Repl. Vol. 2005) where the police have not obtained prior authorization to do so pursuant to W. Va. Code § 62-1D-11 (1987) (Repl. Vol. 2005).

Syl. Pts. 2 and 4, *Mullens*. However, in *Mullens*, this Court reversed a conviction and sentencing order of a defendant on this basis where an informant entered his house and recorded a conversation

with no judicial warrant used by the State in order to obtain a guilty plea. *Id.*, 221 W. Va. at 92, 650 S.E.2d at 191. This is distinguishable from a passing reference made to these statements in the State's closing argument in another defendant's case. It is unclear from what Appellant cites in Mr. DeMent's August 21, 2007, suppression hearing whether a warrant was obtained with respect to the recordings between he and his uncle, but it is very dubious as to how Appellant has standing to have his conviction reversed due to the State's reference to this.

Additionally, Appellant wrongly contends this was a violation of *Crawford, supra*. In *Crawford*, the United States Supreme Court held the following:

Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: *unavailability and a prior opportunity for cross-examination*. We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

Id. at 68, 124 S. Ct. at 1374 (emphasis added). This is inapplicable here due to Brian DeMent being available and testifying at trial. *Crawford* dealt with testimonial, out-of-court statements where the witness was unavailable and there was no chance for prior cross-examination. In that instance, according to the Court, such statements should not be admitted. Thus, *Crawford* is inapplicable in the case at bar.

This reference by the State in its closing argument was one referring to a statement made by Mr. DeMent to his uncle which he discussed to the private investigator, Mr. Greg Cook—a recording that was played by defense counsel to impeach the testimony of Brian DeMent. It appears that the facts are in dispute as to whether what the Prosecutor was referring to in the closing statement was redacted from what was played to the jury. Brian DeMent's mentioning his uncle wearing a wire and

discussing this matter with him was on the recorded statement marked as Defendant's Exhibit 12. However, the circuit judge found that it was not redacted. In light of all of this, Appellant fails to establish that there was an abuse of discretion in accordance with *Keesecker, supra*, on the part of the circuit court in denying his motion regarding the reference made by the State.

In determining whether a prosecutor's comments are so damaging as to warrant reversal, this Court in Syllabus Point 4 of *Keesecker* also held the following:

"Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters." Syl. Pt. 6, *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995).

Appellant has failed to establish a violation of any of these factors.

In light of all of this, Appellant's argument fails on this ground.

V.

CONCLUSION

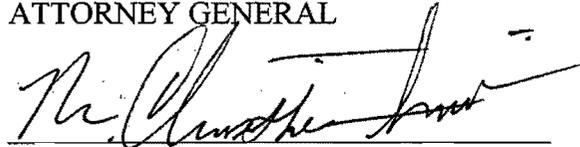
For the foregoing reasons, the judgment of the Circuit Court of Cabell County should be affirmed by this Honorable Court.

Respectfully submitted,

State of West Virginia,
Appellee,

By counsel,

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read "R. Christopher Smith", is written over a horizontal line.

R. CHRISTOPHER SMITH
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CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee, State of West Virginia* was mailed to counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this 30th day of July, 2009, addressed as follows:

Jay C. Love, Esq.
624 Eighth Street
Huntington, West Virginia 25701



R. CHRISTOPHER SMITH

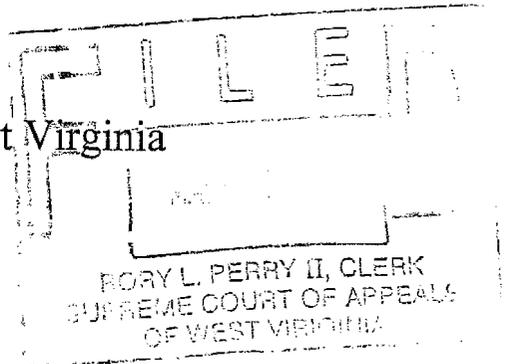
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Supreme Court of Appeals, State of West Virginia

State of West Virginia Ex Rel,
Christopher Wayne Browning,
Petitioner

V

Evelyn Seifurt, Warden
Northern Correctional Facility,
Respondant



Civil Action # 99-C-320
Judge John L. Cummings

Petition for Writ of Mandamus

Comes now the petitioner and Submits this Petition for Writ of Mandamus, requesting the Court, to make the same returnable before this court, and to grant relief to the Petitioner in the form of an order issued to Judge Cummings of the Cabell County Circuit Court, that Judge Cummings return a ruling on the Petition for Writ of Habeas Corpus, civil case #99-C-320, which was filed with his court on April 28,1999.

The Petitioner feels that ten years is more than sufficient time to reach disposition of said Habeas. The Court's extreme delay in disposition has effectively blocked the Petitioner from seeking any further remedy and is in fact denying the Petitioner , Due Process of Law.

Wherefore the Petitioner, respectfully prays that the relief requested herein be granted to him by this Honorable Court.

A handwritten signature in cursive script that reads "Christopher W. Browning".

Christopher Wayne Browning # 24003

Glen D. Conway, WV Bar # 8874

Pro se and by counsel

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Huntington, WV 25701