

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

v.

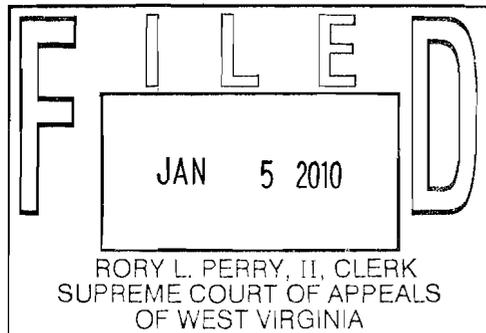
Supreme Court No. 35133

Circuit Court No. 07-F-289
(Kanawha)

DARRELL EUGENE SMITH,

Appellant.

APPELLANT'S REPLY BRIEF



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APPELLANT'S REPLY BRIEF

Reply Argument

- I. **Taint Is An Issue Of Reliability That The Court Must Screen Outside The Presence Of The Jury To Determine The Admissibility Of Testimony. The Trial Court Erred As A Matter Of Law By Ruling That It Did Not Have A Gate Keeping Duty To Protect Mr. Smith's Due Process Right To A Fair Trial.**

The trial court erred as a matter of law by denying that it had the authority to hold a pretrial suppression hearing when Mr. Smith proffered evidence that the children's testimony was so unreliable that its admission would violate due process. This "taint" hearing is in principle no different from a hearing to determine the admissibility of in-court identifications, confessions, or any number of other suppression situations where the court must exercise its gate keeping function to rule on the admissibility of particularly prejudicial evidence before it goes to the jury.¹ The only distinction between these hearings is the circumstances a defendant must

¹ Even the State analogizes taint hearings to identification suppression hearings. Appellee's Brief 13.

show before triggering a right to the *in camera* screening, yet in the case at bar the trial court flatly denied that it had a gate keeping function to fulfill rather than considering the proffered evidence. As such, the proper standard of review is *de novo* because “[w]here a trial court’s determination involves a construction of the *West Virginia Rules of Evidence* and rulings of law, [the court’s] review is plenary.” *State v. Lowery*, 222 W. Va. 284, 287, 664 S.E.2d 169, 172 (2008). The State’s contention that the proper standard of review relates to the question of competency of the child witnesses is simply wrong. Appellee’s Brief 7.

A. Taint Is An Issue Of Reliability, Not Credibility, And Therefore Goes To Admissibility.

The State mistakenly conflates reliability with competency/credibility. Appellee’s Brief 7. In other words, the State asserts that if a witness is competent to testify, then any question that their testimony is the product of suggestive influences is a credibility issue for the jury to decide rather than one of reliability for the court to determine. Appellee’s Brief 11-12. However, properly distinguished reliability “[is] the linchpin in determining the admissibility of evidence under a standard of fairness that is required by the Due Process Clause of the Fourteenth Amendment,” *State v. Farley*, 192 W. Va. 247, 452 S.E.2d 50, footnote 8 (1994) (*quoting State v. Michaels*, 136 N.J. 299, 642 A.2d 1372, 1380 (N.J. 1994)). As such, reliability is a question for the court to determine initially, and the trial court’s failure to fulfill this duty cannot be remedied by the jury’s later reliance on evidence that ought to have been screened and ultimately excluded.

Correctly understood, taint is no more an issue of competency/credibility than in-court identifications are when screened pursuant to *State v. Casdorff*, 159 W. Va. 909, 230 S.E.2d 476 (1976). In *Casdorff* this Court ruled that:

In determining whether an out-of-court identification of a defendant is so tainted as to require suppression of an in-court identification a court must look to the totality of the circumstances and determine whether the identification was reliable, even though the confrontation procedure was suggestive, with due regard given to such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *Id.* at Syllabus Point 3.

The record in *Casdorph* gives no reason to doubt that the witness in that case was a normal, competent adult. *See Casdorph*, 159 W. Va. at 911, 230 S.E.2d at 478-79 (1976). He testified at trial, and the jury undoubtedly considered his credibility. *Id.* at 915, 230 S.E.2d at 480. Furthermore, there is no doubt that the factors that go into the court's determination of admissibility also inform the jury's weighing of credibility. *See* WVRE 104(e). However, none of this relieves the Court of its duty to screen the evidence to ensure its reliability before it may be submitted to the jury. *See, e.g., State v. Stacy*, 181 W. Va. 736, 745, 384 S.E.2d 347, 356 (1989). The jury has no place weighing the credibility of evidence that should have been ruled inadmissible precisely because lay jurors are ill-equipped to discount entirely such wholly unreliable evidence. *See* Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers*, § 1-3A (4th Ed. 2000) (“[T]he law of evidence has long been viewed as the product of the jury system, i.e., the need to shelter untrained citizens from the temptation to accept uncritically that which may be unreliable and of doubtful credibility.”).

The same reasoning applies in many other situations where proffered evidence is so prejudicial that the trial court must take special care to ensure that it is reliable enough to pass constitutional muster. *See People v. Michael M.*, 618 N.Y.S.2d 171, 176 (N.Y. Sup. Ct. Kings County, 1994) (“Many of the exclusionary rules are based on a determination of the reliability of evidence.”). Reliability is an important concern for the admissibility of expert testimony,

hypnotically recalled memories, confessions to the police, Rule 404(b) evidence, and child hearsay statements. *See, e.g., Wilt v. Buracker*, 191 W. Va. 39, 46, 443 S.E. 2d 196, 203 (1993) (applying the *Daubert* standard to experts in West Virginia); *See also* Appellant’s Brief 15-16. All of these situations show that the trial court has a duty to ensure the reliability of evidence prior to its admission at trial completely independent of competency or the credibility weighing function of the jury. *Cf., e.g., Gentry v. Magnum*, 195 W. Va. 512, 466 S.E.2d 171, 178 (1995) (whether an expert’s opinion is reliable is not an issue of truthfulness). Taint hearings are substantially the same – it is simply that the factors that can make a child’s recollection and testimony unreliable and constitutionally infirm are different from the factors that can render an adult’s testimony unreliable and therefore inadmissible. *Cf. Casdorff*, 159 W. Va. at 915-16 (lack of viewing opportunity, suggestive line-up); *Farley*, 192 W.Va. at 257 (1994) (voluntariness of confession); *Michaels*, 642 A.2d. at 1377 (1994). *See also Idaho v. Wright*, 497 U.S. 805, 812-15, 110 S. Ct. 3139, 3144-3147 (1990).

In light of this distinction between reliability and credibility, much of the State’s argument falls apart. Stating that “the jury had an opportunity to hear Dr. Krieg’s testimony” is essentially reiterating the problem as if it were the solution. Appellee’s Brief 12. While reliability is one factor that the jury may consider in assessing credibility, it is first and foremost an issue of admissibility for the trial judge. *See* Appellant’s Brief 14-15. The trial court should have examined the admissibility of the evidence by weighing its reliability before that or any other evidence reached the jury. The court’s failure to review the evidence on the merits deprived Mr. Smith of his right to seek exclusion, and contrary to the State’s assertions, potentially prevented Mr. Smith from thoroughly airing his argument on unreliability since West Virginia Rule of Evidence 104 permits the court to consider inadmissible sources of evidence in reaching

preliminary questions. *See* Franklin D. Cleckley, Handbook on Evidence for West Virginia Lawyers, § 1-6 (4th Ed. 2000). The trial court's ruling that it lacked the power to hold what was essentially a suppression hearing constituted an unjustifiable restriction on the authority of circuit courts to enforce the West Virginia Rules of Evidence and violated Mr. Smith's right to due process. *Michaels*, 642 A.2d at 1380 (1994) ("Competent and reliable evidence remains at the foundation of a fair trial, which seeks ultimately to determine the truth about criminal culpability. If crucial inculpatory evidence is alleged to have been derived from unreliable sources due process interests are at risk.").

B. West Virginia Law Permits The Trial Court To Conduct Pretrial Hearings To Determine The Admissibility Of Evidence, And Mandates Screening In Some Circumstances, Contrary To The Trial Court's Ruling.

While *State v. Michaels*, 642 A.2d 1372 (N.J. 1994), establishes a convenient framework for testing the admissibility of potentially unreliable evidence, ultimately the trial court's authority and obligation to hold such hearings is rooted in the West Virginia Rules of Evidence and the State and Federal Constitutions.

This Court has recognized on multiple occasions that it violates "fundamental principles of due process" for the State to rely on evidence that "lacks minimum indicia of reliability." *State v. Hulbert*, 209 W. Va. 217, 226, 544 S.E.2d 919, 928 (2009) (*citing State v. Ford*, 973 P.2d 452, 456 (Wash. 1999) (insufficiency of proof of prior convictions for sentencing enhancement)). *See also* *State v. Farley*, (acknowledging NJ's holding in *Michaels*); *State v. Stuckey*, 174 W. Va. 236, 238-39, 324 S.E.2d 379, 381 (1984) (*quoting State v. Caron*, 334 A.2d 495, 498 (Me. 1975) (regarding the court's reliance on hearsay evidence of dubious reliability)). Furthermore, West Virginia Rule of Evidence 104(a) requires that the court, not the jury, make preliminary findings of fact to determine the admissibility of evidence at trial. WVRE 104(a).

This mandate is especially true for particularly prejudicial evidence, such as 404(b) testimony, eyewitness identification testimony, confessions, and seized contraband that can virtually preclude a favorable verdict for the defendant. The Innocence Project, Facts on Post Conviction DNA Exonerations <http://www.innocenceproject.org/Content/351.php> (last visited Jan. 4, 2010). The sexual abuse accusations of children clearly fall into this category of fate sealing evidence, especially here where there is no significant corroborating evidence. See Jacqueline McMurtrie, *The Role Of The Social Sciences In Preventing Wrongful Convictions*, 42 Am. Crim. L. Rev. 1271, 1284-85 (2005) (jurors unlikely to disbelieve child sex abuse accusations).

These same principles in West Virginia law led the New Jersey Supreme Court to the unavoidable conclusion that where a defendant can make a threshold showing that a child's memory is tainted, the State must prove by clear and convincing evidence that the child's testimony is nonetheless reliable before its admission at trial. *Michaels*, 642 A.2d at 1383. The court reached that conclusion after looking at its eyewitness identification jurisprudence, which is materially the same as that of West Virginia and the United States Supreme Court. *Id.* at 1382. The *Michaels* court noted that in the case of eyewitness identification, it could violate due process to introduce unreliable evidence against the defendant. *Id.* The *Michaels* court also relied on its evidence rule 104, which is substantially the same as West Virginia's Rule 104, in determining that the inquiry required *in camera* review. Compare WVRE 104(a) with NJRE 104(a). In short, the premises that inextricably led to the *Michaels* court's conclusion are equally true here. The law of West Virginia, not that of New Jersey, requires trial courts to suppress testimony that is as unreliable and as damaging as that used to convict Mr. Smith.

Other jurisdictions have found that their laws and the federal Constitution require pretrial hearings regarding the reliability of evidence as well. The State represents that the *Michaels*

decision is an anomaly that a majority of other states have rejected, Appellee's Brief 14, but this statement is misleading. It is true that relatively few States have explicitly adopted the precise procedure outlined in *Michaels*, but the list of jurisdictions that either require or permit some kind of pretrial hearing to screen unreliable child testimony besides New Jersey includes courts in Pennsylvania, Washington, Wyoming, Minnesota, Massachusetts, New York, Delaware, Maine, New Mexico, and some counties in West Virginia. *See* Appellant's Brief 12-13; *See also Ardolino v. Warden*, 223 F. Supp.2d 215, 238-39 (D. Me. 2002) (acknowledging that Maine's competency jurisprudence extends to issues of taint); *State v. Ruiz*, 141 N.M. 53, 59, 150 P.3d 1003, 1009 (2007) (trial court did not abuse its discretion in holding a taint hearing). Counsel can only find reference to five states that have explicitly denounced² any kind of *Michaels* type hearing. Appellant's Brief 12-13.

C. Based On The Evidence Of Improper Suggestion, Mr. Smith Was Entitled To A Pretrial Taint Hearing And The Children's Testimony Should Have Been Suppressed.

The evidence in this case showed that girls' parents ignored life-threatening illness and expected an 11 year old to take care of her baby sister so that John and Anita S. could sleep in. Appellant's Brief 3. Several witnesses' testimony confirmed that the children's parents, John and Anita S., paid inordinate attention to anything sexual, sharing stories about their exploits and showing off sex toys and pornography to their neighbors and relatives – all in front of the children. Appellant's Brief 24-25. Under such circumstances, it would be impossible for a child to not make the connection between sexuality and positive attention, and indeed the record

² Those states are Oregon, Alaska, Texas, Kentucky, and Ohio. Appellant's Brief 13. Other states have avoided ruling with regards to *Michaels* by distinguishing the cases before them. *See, e.g., State v. Michael H.*, 291 Conn. 754, 767-68, 970 A.2d 113, 122 (2009).

reveals that the children did so and sought out that attention. Appellant's Brief 25.³ In addition, Anita S. had a strong motive to coach her children and Dr. Krieg opined that there was clear evidence that the interviews had tainted the girls' recollections and that someone had coached the children and told them how to answer the questions. Appellant's Brief 1. This and more entitled Mr. Smith both to a taint hearing and to have the girls' testimony ultimately suppressed.

The State points out that the children in *Michaels* were younger than the children in this case. Appellee's Brief 10. However, this broad statement glosses over the exact nuances that a pretrial taint hearing is meant to address. Age is considerably less important where, as here, an expert's opinion is not merely that there was *potential* for taint but instead that there was *actual* taint and that these particular children's memories were demonstrably inaccurate. Appellant's Brief 1. Additionally, Dr. Krieg stated that it was in part because the girls were adolescents that their inconsistencies, lack of detail, and developmentally immature language pointed so clearly to susceptibility to suggestion and coaching. Appellant's Brief 21.

Also, contrary to the State's assertion, the accusations in this case are not clearly independent. B.S. made her accusation only after a friend made a similar accusation to her. Appellant's Brief 4. Furthermore, B.S. only repeated the accusation to an adult because the friend threatened to tell on her. *Id.* Even then, an entire weekend went by before B.S. told her counselor, providing her ample opportunity to talk to her parents and siblings. *Id.* Her explanation for telling the counselor but not (allegedly) her family was that she knew and trusted the counselor. (7/22/08 Tr. 5, 209-09). After repeating the accusation at school, Anita S. questioned N.S. about Mr. Smith before N.S. made any kind of accusation. Appellant's Brief 19.

³ Staci Kirk testified that while visiting Anita and John S. that the couple could not locate a particular sex toy that they wanted to show off. The children volunteered to help look for it, apparently knowing it by name and appearance. Appellant's Brief 25.

These circumstances are at best questionable and deserved a hearing to flesh out the details. However, the trial court incorrectly denied Mr. Smith's request as a matter of law.

Finally, contrary to the State's assertions taint hearings are sound public policy. Appellee's Brief 12-14. Public sentiment is, of course, largely inapposite when it runs contrary to the constitutional right to due process, but even setting that aside, the State's concerns are unpersuasive.⁴ Karol L. Ross, *State v. Michaels: A New Jersey Supreme Court Ruling With National Implications*, 78 Mich. B. J. 32, 35 (1999). The State complains that taint hearings would perpetuate myths about the unbelievability of children. Appellee's Brief 13. However, the social science research directly contradicts this unfounded belief; while jurors may *generally* believe that children are susceptible to suggestion and prone to fantasy, in actual cases jurors are unwilling to disbelieve testifying child witnesses. Jacqueline McMurtrie, *The Role Of The Social Sciences In Preventing Wrongful Convictions*, 42 Am. Crim. L. Rev. 1271, 1284-85 (2005). Furthermore, taint hearings can validate legitimate accusations. Dana D. Anderson, *Assessing The Reliability Of Child Testimony In Sexual Abuse Cases*, 69 S. Cal. L. Rev. 2117, 2131 (1996). The ability of the trial court to hold taint hearings will promote a search for the truth in these cases and ensure that persons accused will only be convicted on reliable evidence.

The State further fears that defendants will over-utilize taint hearings. Appellee's Brief 13. This concern ignores, however, the fact that taint hearings will not be required in every case – only in cases where there is evidence of suggestive questioning or improper influences as in this case. If state officials are not following proper protocols and interview procedures questions

⁴ The State relies heavily on John E. B. Myers' *Taint Hearings For Child Witnesses? A Step In The Wrong Direction* for its policy discussion. 46 Baylor L. Rev. 873 (1994). It is worth pointing out that Professor Myers is not opposed to pretrial reliability hearings per se – he just disagrees with the exact standard applied in the *Michaels* case, and so after explaining some of the benefits of taint hearings, he proposes what he thinks to be a better standard should courts choose to follow New Jersey's lead. *See Id.* at 902-04.

should be raised regarding the reliability of evidence. If authorities follow proper procedures, which should occur in most cases, there would not be a basis for a taint hearing. Thus, taint hearings are sound public policy, as they will promote proper interviewing of children and the obtaining of reliable evidence. In addition, defendants bear the initial burden of proof to show that a taint hearing is necessary. Appellant's Brief 10. As such, these motions cannot effectively be employed as a tactic to delay trial nor will they waste judicial resources – the judge must decide as a threshold issue whether there is sufficient evidence to warrant a full-blown taint hearing before ever ordering one. *Id.* Also of concern to the State is that taint hearings will provide additional avenues for appeal. Appellee's Brief 13. The State's argument essentially begs the question (taint hearings are unjustified because appeals from taint hearings are unjustified because taint hearings are unjustified...). If taint hearings are required by due process, then of course defendants ought to be able to appeal issues relating to taint hearings and whether their particular arguments on appeal possess merit will turn on the specifics of the case.

The last two disadvantages argued by the State are that defendants would be treated differently depending on whether private or public actors taint the child's memory and that there is no principled basis for limiting taint hearings to children. Appellee's Brief 13-14. Myers relies on *Colorado v. Connelly* to demonstrate this unequal treatment.⁵ Appellee's Brief 14 (footnote 30). The failure here is that Myers and the State fail to distinguish between voluntariness (as in *Connelly*) and reliability. Voluntariness certainly has a bearing on reliability (*See supra*), but it is not co-extensive with reliability. There are additional concerns about the relationship between

⁵ Please note that the court in *Connelly* did not conclude that defendants could not challenge the voluntariness of confessions elicited by State actors because of this putative distinction between public and private action. *See State v. Connelly*, 479 U.S. 157 (1986). The court merely held that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Id.* at 167. The court also concluded that the use of evidence is not coercive enough to implicate the due process clause on voluntariness grounds, but it is silent as to reliability as distinguished from voluntariness. *Id.*

the state and the individual tied up in the notion of voluntariness beyond whether a confession obtained through brutality is reliable, and *Connelly* does not address whether a privately obtained confession should be excluded where the circumstances surrounding it render it wholly unreliable. See footnote 5, *supra*. Mr. Smith argues that it is the prosecution's use of unreliable evidence, not its procurement, which constitutes improper State action. Lastly, regarding the State's slippery slope argument about confining taint hearings to children, it should be clear that adults are ALREADY subjected to pretrial reliability hearings – it is just that the contexts that are likely to render an adult's testimony unreliable are different from those that threaten the reliability of child and adolescent testimony. Appellant's Brief 15. Just as with adult eyewitnesses, hypnotically aided witnesses, etc., in those circumstances where a child's memory may be substantially unreliable the trial court must screen the evidence pretrial to protect the defendant's due process right to a fair trial. Because the trial court erroneously ruled otherwise, Mr. Smith is entitled to have his conviction reversed so that he may receive a fair trial.

II. The Trial Court Abused Its Discretion By Denying Mr. Smith's Request For A Mistrial When A State's Witness Testified To Excluded 404(b) Evidence

The State argues that there was no manifest necessity for a mistrial and thus no error. Appellee's Brief 17. However, this is incorrect. This Court has previously found manifest necessity in situations where the aggrieved party was prejudiced far less than Mr. Smith was in this case. See *State ex. rel. Bailes v. Jolliffe*, 208 W. Va. 481, 486, 541 S.E.2d 571, 576 (2000). In *Bailes*, the defense merely asked whether the defendant had been found guilty or not guilty of a previous crime that the State introduced as 404(b) evidence. *Bailes*, 208 W. Va. at 483, 541 S.E.2d at 573. The State moved for and was granted a mistrial because "the question had been raised in the jury's mind." *Id.* at 484, 541 S.E.2d at 574. The trial court found and this Court

agreed that these circumstances sufficed to establish a manifest necessity for mistrial, thus defeating a claim of former jeopardy. *Id.* at 486, 541 S.E.2d at 576. Mr. Smith argues that he was prejudiced to a vastly greater degree than was the State in *Bailes*, and therefore it was an abuse of discretion to deny Mr. Smith's motion. Furthermore, the State's argument ignores the fact that standing alone, the admission of unscreened 404(b) evidence is itself prejudicial trial error, so even if a mistrial were not required at the time (though it certainly was), it still requires reversal here on appeal.

Mr. Smith also argued that it was virtually a *per se* abuse of discretion for the trial court to issue conflicting rulings on congruent issues. Appellant's Brief 31. Specifically, that while a mistrial was denied when the entire jury heard that there were additional charges and a third accuser, the court dismissed a venireperson for cause because he overheard that there were other charges. Appellant's Brief 30. The State responds that this was not the only reason that the trial court struck the venireperson. Appellee's Brief 17. However, the record indicates otherwise. The entirety of the court's statement on this issue is as follows:

“Okay, all right. So you did hear that, and I appreciate your coming forward and telling us that. And obviously, no objection, I'm going to go ahead and excuse you – [Mr. Good: Okay] – from further service. You don't need to report to the fifth floor. You're excused from further service. And I guess you just call the machine tomorrow.”

Tr. 7/22/08 26-27. After that, defense counsel apologized for the slip up, having not realized anyone else was present. *Id.* The court made no mention of any reason for removing the venireperson other than that he knew of the other charges. *Id.*

If a venireperson must be struck for merely knowing that there were other counts, then *a fortiori* the entire jury must be struck if they know that and more. Appellant's Brief 31. The jury heard B.S. accuse Mr. Smith of molesting her *two* sisters, even referring to A.S. by name.

Appellant's Brief 28. The solution at trial was to drop the subject without resolution, and at the completion of B.S.'s testimony, a juror stood up wishing to address unanswered questions.⁶ Appellant's Brief 32. The jury was then constantly reminded about A.S. as many subsequent witnesses mentioned her in the course of their testimony. *Id.* N.S. even referenced what happened to her and her sisters. Appellant's Brief 32. Finally, at the conclusion of the cases in chief, the jury received a verdict form listing counts II, IV, VI, IX, X, XI, XII, unambiguously demonstrating that there were originally more counts. Appellant's Brief 33.

No one reasonably qualified to sit on a jury could fail to make the connection between B.S.'s testimony about A.S. and the missing counts; the judicial system routinely expects jurors to draw more attenuated inferences than this. Given the inevitability of the inference, and the unquestionable prejudice of 404(b) evidence⁷, the jury was most certainly "swayed by the error" making the mistake quite harmful. *See State v. Guthrie*, 194 W. Va. 657, 684, 461 S.E.2d 163, 190 (1995) (there must be sufficient evidence outside the inadmissible testimony AND the jury must not have been substantially swayed by the error). Indeed, the State may as well have rested at that point. *Willett*, 674 S.E.2d (W. Va. 2009) ("Evidence of uncharged misconduct strips the defendant of the presumption of innocence.") (*Citing* Edward Imwinkelried, 1 *Uncharged Misconduct Evidence* § 1:2 [2008]). As a result, Mr. Smith lost any realistic presumption of innocence just moments into the State's case and he is entitled to a new trial.

⁶ Mr. Smith acknowledges that he can only speculate as to what the juror wanted to ask, but the highly unusual event is noteworthy and deserves mention.

⁷ *See Generally State v. Willett*, ___ W. Va. ___, ___ 674 S.E.2d 602, *no pinpoint cite available* (W. Va. 2009) (Ketchum, J., concurring)

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CERTIFICATE OF SERVICE

I, Matthew D. Brummond, hereby certify that on the 5th day of January, 2010, I delivered via U.S. Postal Service a copy of the foregoing Appellant's Reply Brief to Robert D. Goldberg, Assistant Attorney General, Attorney General's Office, 1900 Kanawha Blvd. E, Room E-26, Charleston, WV 25305.

A handwritten signature in black ink, appearing to read 'Matt Brummond', is written above a horizontal line.

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