

No. 35297

**IN THE SUPREME COURT OF APPEALS  
OF  
WEST VIRGINIA**

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**CHARLESTON, WEST VIRGINIA**

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STATE OF WEST VIRGINIA,  
Plaintiff Below-Respondent,

v.

CIRCUIT COURT OF LOGAN COUNTY  
Case No. 06-F-180

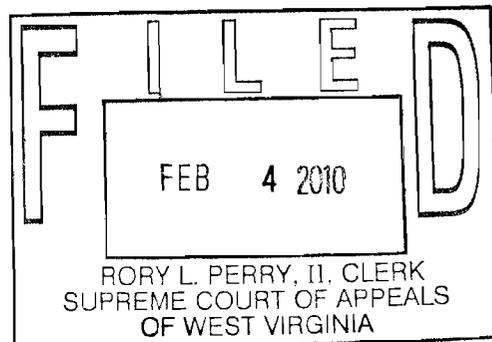
MARK GILMAN,  
Defendant Below- Appellant.

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**BRIEF OF APPELLANT**

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**West Virginia Cases**

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**State v. Guthrie**, 194 W. Va. 657, 461 S.E. 2d 163 (1995).....7,8  
**State v. Hottinger** 194 W. Va. 716, 461 S.E. 2d 462 (1995).....11  
**State v. Moses** 110 W.Va. 476,158 S.E. 715 (1931).....11  
**State v. Randolph** 179 W.Va. 546,548,370 S.E. 2d 741,743 (1988).....9  
**State v. Sugg** 193 W.Va. 388 456 S.E. 2d 741, 743 (1988).....11  
**State v. Miller** 197 W.Va. 588, 476 S.E. 2d 535 (1996).....10  
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**CONSTITUTIONAL PROVISIONS:**

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**PETITION**

**TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF  
WEST VIRGINIA.**

## **KIND OF PROCEEDINGS AND NATURE OF RULINGS BELOW**

The Appellant, Mark Gilman, was convicted on July 31, 2008 in the Circuit Court of Logan County, West Virginia, on one (1) count of "Murder in the 2<sup>nd</sup> Degree" in violation of West Virginia Code § 61-2-1 for the alleged killing of Mary Pelphrey.

The Appellant filed various pretrial and post trial motions regarding the charge against him. Specifically, the Appellant filed a Motion to Suppress which was denied by the court. See, Defendants Motion to Suppress; See, Courts Order Denying Defendants' Motion to Suppress.

At the close of the state's evidence, the defendant moved the Court for Judgment of Acquittal, said motion being denied. Tr Vol. 2 Pgs. 99-100

The defendant then proceeded to present his defense. Upon submission of the case to the jury, the defendant again moved the Court for judgment of Acquittal, Said motion being denied. Tr. Vol. 3 Pg. 200

The jury deliberated and returned a verdict of guilty of one (1) COUNT OF Murder in the 2<sup>nd</sup> Degree with a recommendation of Mercy. See, Jury Trial Order entered July 31, 2008; Tr. Vol 4 Pg. 59

On the 18<sup>th</sup> day of September 2008 the defendant moved the Court for a new trial in accordance with Rule 33 of the West Virginia Rules of Criminal Procedure, said motion was denied.

Additionally, the defendant was sentenced by the Logan Circuit Court Judge Roger Perry to a sentence of Forty (40) years, on the 18<sup>th</sup> day of September 2008. See, Sentencing Order entered the 30<sup>th</sup> day of September 2008.

## **STATEMENT OF FACTS**

The Appellant, Mark Gilman, was convicted on July 31, 2008 in the Circuit Court of Logan County, West Virginia, on one (1) count of "Murder in the 2<sup>nd</sup> Degree" with a recommendation of Mercy, in violation of West Virginia Code § 61-2-1.

The conviction arose from the death of Mary Pelphrey, on or about January 2, 2005. The defendant contended that he was not involved in the murder of Mary Pelphrey and the burning of her body.

In pretrial proceedings, the State acknowledged that there was no corroborating evidence to connect Mr. Gilman to the murder.

At trial the State presented the following evidence:

- 1.) The statement of the defendant;
- 2.) The testimony of the Medical Examiner who testified to the cause and manner of death;
- 3.) A forensic scientist who admitted that there was no DNA evidence linking Mr. Gilman to the crime scene;

At trial, the defendant presented several witnesses who testified that they knew Mary Pelphey was seen with several different men and women prior to her disappearance and death, none of which happened to be Mark Gilman, The defendant testified on his own behalf and denied the charges. On the 31<sup>st</sup> day of July 2008, following a jury trial, the defendant Mark Gilman was convicted of one (1) count of Murder in the Second (2<sup>nd</sup>) Degree, in violation of West Virginia Code §61-2-1. The defendant was sentenced to Forty (40) years on the 18<sup>th</sup> day of September 2008.

### **ASSIGNMENTS OF ERROR**

- I. The defendant was denied Due Process protection, under Article 3 Section 10 of the Constitution of the United States, by
- II. The evidence presented does not support a conviction of 2<sup>nd</sup> degree murder.
- III. The Circuit Court erred in not suppressing the defendant's statement as he was not fully informed as to the magnitude of the crime and potential penalty in violation of Article 3 Section 5 and Article 3 Section 10 of the Constitution of West Virginia and the 5<sup>th</sup> Amendment of the Constitution of the United States of America.
- IV. The defendant was denied Due Process under the law by improper jury selection.
- V. The defendant was denied Due Process under the law by the Prosecutor's misleading statements.

### **POINTS AND AUTHORITIES RELIED UPON**

#### West Virginia Cases

<u>State v. Critzer</u> 167 W.Va. 655, 280 S.E. 2d 288 (1981).....	11
<u>State v. Goff</u> 169 W.Va. 778,784 289 S.E. 2d 473 (1982).....	9
<u>State v. Guthrie</u> , 194 W. Va. 657, 461 S.E. 2d 163 (1995).....	7,8
<u>State v. Hottinger</u> 194 W. Va. 716, 461 S.E. 2d 462 (1995).....	11
<u>State v. Moses</u> 110 W.Va. 476,158 S.E. 715 (1931).....	11
<u>State v. Randolph</u> 179 W.Va. 546,548,370 S.E. 2d 741,743 (1988).....	9
<u>State v. Sugg</u> 193 W.Va. 388 456 S.E. 2d 741, 743 (1988).....	11
<u>State v. Miller</u> 197 W.Va. 588, 476 S.E. 2d 535 (1996).....	10
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<u>State v. Phillips</u> 194 W.Va> 569, 461 S.E. 2d 75 (1995).....	10

## DISCUSSION OF LAW

Article 3 Section 10 of the Constitution of West Virginia provides, “ No person shall be deprived of life, liberty, or property, without due process of law, the judgement of his peers.” Likewise, the 5<sup>th</sup> Amendment of the Constitution of the United States provides that no person shall be “deprived of life, liberty, or property, without due process of law.”

The Prosecuting Attorney presented no corroborating evidence to back up the statement given by the defendant. The prosecutor merely presented evidence of the scene where the body was discovered through the testimony of various police officers who investigated the death, and proved that Mr. Gilman made a statement to the State Police.

Dr. Bobby Miller, a Forensic Psychiatrist, evaluated Mr. Gilman and found it quite possible for a person such as Mr. Gilman, with his intellect and psychological make-up to give a false confession, especially when under pressure. Tr. Vol. 2 Pgs. 105-117

The only evidence that the Prosecutor presented that may reasonably allow a jury to infer that the defendant even knew the victim Mary Pelphey was from his false, coerced confession. There was no evidence presented by the State that linked any evidence or DNA between Mark Gilman, his vehicle, home, and the victim’s body and the crime scene. Tr. Vol. 2 Pgs. 17-18

James A. Kaplan, M.D., chief medical examiner with the Medical Examiner’s office in Charleston, West Virginia, testified that he could not find any evidence directly linking Mr. Gilman to the death of Mary Pelphey. Trial Transcript Vol. 2 Pg. 18

The West Virginia State Police officer David Miller, Forensic Scientist of the Forensic Laboratory in South Charleston, West Virginia testified that dozens of pieces of evidence were analyzed for DNA , including cigarette butts found at the scene where the body was found. However, DNA was found of persons other than Mary Pelphey or Mark Gilman. Specifically, semen of another unknown man was found inside the body of the deceased, Mary Pelphey. Trial Transcript Vol. 2 Pg. 52 Officer Miller testified that he did not attempt to find the source of the semen, but did testify his test revealed it was not left by Mark Gilman and had to have been left within 24 hours of her death. Trial Transcript Vol. 2 Pg. 51-55 Not one of the dozens of items taken from Mark Gilman, including saliva linked him to the death of Mary Pelphey. Tr. Vol. 2 Pg. 54 That should have been a trigger to investigate who left their DNA at the crime scene. In fact, there was DNA left by a man who was not identified within hours before her death. Tire casts were made of the tire tracks found at the scene. The tracks did not match the tires on Mr. Gilman’s vehicle. Trial Transcript Vol. 2 Pg. 51-54 The vehicle which Mr. Gilman stated in his statement that he transported the victim in contained no evidence including DNA to link him to the crime scene. Trial Transcript Vol. 1 Pg. 52-54

Despite all the evidence indicating the presence of persons other than Mark Gilman, no additional investigation was conducted. The best evidence that the State could present was that

Mark Gilman had made a statement. That statement was handwritten by a police officer then signed by Mark Gilman after 5-6 hours of interrogation. The statement was not recorded or videotaped.

## II. The Evidence Presented Does not Support a Conviction of 2<sup>nd</sup> Degree Murder

The evidence presented at trial, when viewed in a light most favorable to the State, does not support a conviction of 2<sup>nd</sup> degree murder.

The criteria for determining whether the evidence is sufficient to support a criminal conviction was established by this Honorable Court, in State v. Guthrie, 194 W.Va. 657,461 S.E. 2d 163 (1995).

In Guthrie, this Court stated,

The function of appellate court when reviewing the sufficiency of the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

Guthrie at 663 (Syl. Pt.1)

Additionally, this Court held,

A criminal defendant challenging of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that a jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that as guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.

Guthrie at 663 (Syl. Pt. 3).

The evidence presented by the State proved that Mary Pelphrey died, her body was burned, and the scene had been tampered with. The State did not charge anyone, including Mr. Gilman, with any crime surrounding the burning of the body or tampering with the crime scene.

There were many loopholes in the State's case and quite a few individuals had been seen with the victim shortly before her death and near the scene of her death shortly thereafter, none of which were Mark Gilman. However, once the State obtained its statement from Mark Gilman, the case was closed.

The evidence when viewed most favorably to the State is insufficient to sustain a conviction for 2<sup>nd</sup> degree murder.

### III. The Circuit Court erred in not suppressing the defendant's statement

The Circuit Court was in error to not suppress the defendant's statement as it was clear from his testimony that he did not understand the consequences of making such a statement, nor did he comprehend the consequences thereof.

Article 3 Section 5 of the Constitution of the state of West Virginia provides that, "...no person in any criminal case shall be compelled to be a witness against himself."

Article 3 Section 10 of the Constitution of the State of West Virginia states that, "... no person shall be deprived of life, liberty, or property, without due process of law, and the judgement of his peers." This mirrors the Constitution of the United States which provides that no person shall be "deprived of life, liberty or property, without due process of law."

The West Virginia Supreme Court of Appeals has held that "some information should be given to the defendant as to the nature of the charge in order that he can determine whether to intelligently and voluntarily exercise or waive his Miranda rights." State v. Goff, 169 W.Va. 778, 784, 289 S.E. 2d 473 (1982) (En 8) (cited in State v. Randolph, 179 W. Va. 546, 548, 370 S.E. 2d 741, 743 (1988)).

The case at hand can be distinguished from Goff and Randolph in that Mr. Gilman was not under arrest at the time that he gave his statement. It was however, a custodial interrogation due to the fact that the defendant did not believe he could freely leave without giving a statement. In fact, Mr. Gilman testified in the trial of this matter, that he believed he would be free to go home upon signing the statement. Tr. Vol. 3 Pgs. 141-143

The defendant traveled to the State Police office in Logan, West Virginia, after work to retrieve his personal items that had been taken by the State Police. He did not go to the State Police station with the intention of giving a statement. Tr. Vol. 3 Pgs. 141-142

In fact, the defendant arrived with his co-worker, Dennis Crum. Mr. Crum testified at the

trial of this matter that Mr. Gilman was secluded at the State Police office for 5-6 hours while he at first waited in the reception area and later in Mr. Gilman's vehicle. Tr. Vol. 3 Pg. 10  
When they first arrived at the Logan police office, Mark asked for his personal property and the police officer began whispering in his ear. Tr. Vol. 1 Pg. 9

Prior to arriving at the State Police office in Logan, the defendant had worked for 8 hours, had little sleep the night before as he had recently learned of the tragic death of his brother and nephew in a fire in Mingo County, West Virginia. The stresses in Mr. Gilman's life at the time of the statement, coupled with lack of sleep render any statement that he signed on that date completely unreliable. Tr. 2 Pgs. 105-117

The suppression hearing took place June 6, 2007 before the Honorable Roger L. Perry, Judge, Circuit Court of Logan County, Logan, West Virginia beginning with the testimony of Bobby L. Miller, M.D. Dr. Miller was recognized as an expert in the field of Forensic Psychiatry by Judge Perry and was allowed to testify with respect to his November 13, 2006 evaluation of Mr. Gilman. Dr. Miller testified that forensic psychiatrists rely on 25 factors to determine if a confession is false and Mark Gilman exhibited 14 of the 25 factors. See pg. 6, Transcript of Suppression Hearing.

Dr. Miller went on to testify that compromised reasoning ability of the confessor due to lack of sleep, stress, exhaustion, mental limitations, limited education are all factors. pg. 7  
Further Mr. Gilman has an I.Q. of 83, which is borderline, and functions in reading between the levels 1<sup>st</sup> and 4<sup>th</sup> grade. pg. 7 Mr. Gilman is also on the social functioning level of a 12 or 13 year old male. pg. 7 Dr. Miller also notes that there is a lack of documentation of the entire interrogation that makes the signed statement highly suspect. pg. 8

Mr. Gilman was given his Miranda rights prior to giving a polygraph examination at around 5:15 p.m. on January 5, 2006. Mr. Gilman was investigated by a different state trooper who wrote out a statement hours later signed by Mr. Gilman without explaining his rights again and this took place after Mr. Gilman asked for a lawyer. Trial Tr. Vol. 1 Pg. 33-35

A. Yes, sir. He stated he wanted me to get him a lawyer. I told him that as far as an attorney was concerned, I couldn't get him a lawyer, that, you know, there were phones in the office, he could use the phone to call an attorney, he could leave to get an attorney. But the only way I could actually provide him a lawyer or the Court would appoint a lawyer like the form says would be if he would have been, to my knowledge, would be charged with that crime to where he would be afforded an attorney at that point.

Q. Did you at that point when he said that, did you intend to continue asking him questions?

A. No, sir. I got up to leave, told him the interview was done at that point. I got up to leave and as I grabbed the door knob to walk out, he stated he still wanted to talk, but he didn't want to talk to me, he wanted to talk to Trooper Vance.

Q. And so you correct me if I'm wrong, but if I understand your characterization, he said at the end he wanted an attorney, and you told him at that point that he could call

someone or else you were going to stop questioning him at that point; is that correct?

A. I was stopping the questioning regardless, but as far as me giving him- the way I understood the question from him was, "I want you to give me an attorney." I don't - couldn't provide him an attorney. I could let him use access to the phone, he could leave the office to go get one, but it wasn't something that I was going to pay for and provide for him. And the only way that that would have- and attorney would be provided like the form would say, or the Miranda Rights form, would be if he were to be arraigned and he would have to be given an attorney at that point.

Q. But was it your intention at that point to not ask him any other questions in light of his statement at that time?

A. Correct. I wasn't going to go any further.

Q. And so how much time passed from the time he said he wanted an attorney to he changed his mind and said he wanted an attorney?

A. From the time I got up out of the chair until I walked to the door-

Q. Would it be fair to say that would even be less than a minute?

A. Yes, sir.

See Trial Transcript Vol. 1, Pg. 33-35.

#### IV. The Circuit Court Erred in Jury Selection

The Circuit Court denied the defendant his due process protection under the law by allowing a juror to serve on the 12 member jury panel over the objection of defense counsel, who had an inherent bias against the defendant. Juror Vance, a preacher, revealed that he served as the minister at the victim, Mary Pelphrey's memorial service, only after serving on the Jury for the first day of trial. A member of the victim's family approached him at Wendy's during a lunch break to talk about the memorial service. His church, helped to assist the family of Mary Pelphrey, who could not afford a proper burial and service. The juror revealed the contact to the Court and also admitted that he did not wear his juror's badge at lunch as instructed to do by the Court. See Trial Transcript Vol. 1 Pg. 55 Defendant's counsel strongly objected to his continued service. Juror Vance continued to serve, even though he was dismissed prior to Jury deliberation. However, by that time the entire jury may have been tainted.

The juror did not wear his juror badge to lunch when he was approached by a member of the victim's family. See Vol. 1 Pg. 55 At that point on the first day of trial before any evidence was presented, Juror Vance should have been excused from further service. He did not reveal his role with the victim and her family until after voir dire and jury selection was complete.

The relevant test for determining a juror is biased is whether the juror had such a fixed opinion that he or she could not be judged impartially the guilt of the defendant. Even though a juror swears he or she could set aside any opinion he or she might hold and decide the case on the evidence, a juror's protestation of impartiality should not be credited if the other facts in the record indicate to the contrary. Syllabus Point 4, State v. Miller, 197 W.Va. 588, 476 S.E. 2d 535

(1996).

When considering whether to excuse a prospective juror for cause, a trial court is required to consider the totality of the circumstances and grounds relating to a potential request to excuse a prospective juror, to make a full inquiry to examine those circumstances and to resolve any doubts in favor of excusing a juror. State v. Schermerhorn 211 W.Va. 376, 566 S.E. 2d 263 (2002).

The language of W.Va. Code, 62-3-3 (1949), grants a defendant the specific right to reserve his or her peremptory challenges until an unbiased jury panel is assembled. Consequently, if a defendant validly challenges a prospective juror for cause and the trial court fails to remove the juror, reversible error results even if a defendant subsequently uses his peremptory challenge to correct the trial court's error. Syllabus Point 8, State v. Phillips, 194 W.Va. 569, 461 S.E. 2d 75 (1995).

Doubts as to whether to excuse a prospective juror should be resolved in favor of the removal of the juror. In State v. Schermerhorn, 211 W.Va. 376, 566 S.E. 2d 263 (2002), the Court, citing Syllabus Point 3 of O'Dell v. Miller, et al, 211 W.Va. 285, 565 S.E. 2d 407 (2002), stated:

“When considering whether to excuse a prospective juror for cause, a trial court is required to consider the totality of the circumstances and grounds relating to a potential request to excuse a prospective juror, to make a full inquiry to examine those circumstances and to resolve any doubts in favor of excusing the juror.”

In State v. West, 157 W.Va. 209, 200 S.E. 2d 859 (1973), the Court further stated:

“When the defendant can demonstrate even a tenuous relationship between a prospective juror and any prosecutorial or enforcement arm of State government, defendant's challenge for cause should be sustained by the court. A defendant is entitled to a panel of twenty jurors who are free from exception, and if proper objection is raised at the time of impaneling the jury, it is reversible error for the court to fail to discharge a juror who is obviously objectionable.”

Article 3 Section 10 of the Constitution of West Virginia provides “No person shall be deprived of life, liberty or property without due process of law, and judgment of his peers.” The jury was tainted by the week long presence of the minister who presided over the memorial service of the victim, Mary Pelphrey. Accordingly, the defendant was denied due process.

#### V. The Defendant was denied Due Process under the law by the Prosecutor's misleading comments.

The assistant prosecuting attorney argued during closing arguments that Mark Gilman was a graduate of Chapmanville High School and therefore, knew or should have known what he was signing when he signed a statement at the Logan State Police office. While it is true, that Mr. Gilman graduated Chapmanville High School, it is not true that this should qualify the defendant as being able to read and comprehend. This inference is in direct contradiction to the testimony

of Dr. Bobby Miller, who evaluated Mr. Gilman and concluded that he was functionally illiterate and could read on a 2<sup>nd</sup> or 3<sup>rd</sup> grade level. Tr. Vol.2 Pg. 105-106. Dr. Miller also testified during the June 6, 2006 suppression hearing that Mark Gilman had a borderline I.Q. of 83 and socially acted as a 12 or 13 year old male. See Suppression Transcript pg. 7

The West Virginia Supreme court of Appeals has previously held that “the State may vigorously prosecute as long as he deals fairly with the accused. It is a flagrant abuse of his position to refer, in his argument to the jury, to material facts outside the record, or not fairly deductible therefrom.” State v. Hottinger 194 W.Va. 716, 461 S.E. 2d 462 (1995) (Syl. Pt. 2) (citing, State v. Moses, 110 W.Va. 476, 158 S.E. 715 (1931) State v. Critzer, 167 W.Va. 655, 280 S.E. 2d 288 (1981) (Syl. Pt. 2).

Additionally, this Court has set forth a test to determine whether a prosecuting attorney’s comments prejudice a defendant. In State v. Sugg, this honorable court stated that Four (4) factors are taken into account in determining whether improper prosecutorial comments are so damaging that a reversal is required:

- 1.) The degree to which the prosecutors comments have a tenancy to mislead the jury and prejudice the accused;
- 2.) Whether remarks were isolated or extensive;
- 3.) Absent the remarks, the strength of the evidence to convict the accused;
- 4.) and, whether the comments were deliberately placed before the jury to divert their attention, State v. Sugg, 193 W. Va. 388,456 S.E. 2d 469 (1995)(Syl.Pt.6).

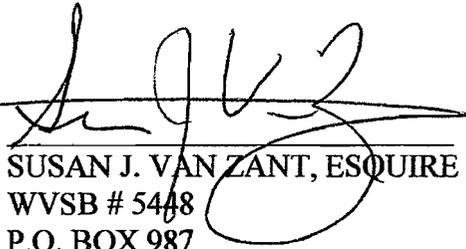
Appellant contends that the inferences made by the prosecuting attorney during closing arguments regarding the victim and the defendants’ level of education is misleading and prejudicial.

**PRAYER FOR RELIEF**

Wherefore, appellant prays that the Jury conviction of One Count of Murder in the Second Degree be overturned, by the Circuit Court of Logan County, State of West Virginia, be REVERSED; and for all other general relief to which appellant may be entitled under the circumstances.

Dated February 3, 2010.

Mark Gilman, Appellant  
by counsel



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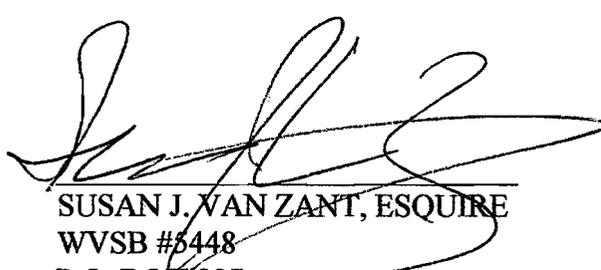
**MEMORANDUM OF PARTIES**

Dawn Warfield, Esq.  
WV Attorney Generals Office  
Appellant Division  
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Charleston, WV 25305

**DESIGNATION OF RECORD FOR APPEAL**

Appellant designates the entire court file as the record in this matter.

Mark Gilman, Appellant  
by counsel



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**CERTIFICATE OF SERVICE**

I, Susan J. Van Zant, do hereby certify that I have served a true and exact copy of the foregoing "BRIEF OF APPELLANT" on this 3rd day of February, 2010, by depositing a true and exact copy in the U.S. Mail to the following:

Dawn Warfield, Esq.  
WV Attorney Generals Office  
Appellant Division  
State Capitol Complex  
Bldg 1, Room E26  
Charleston, WV 25305



SUSAN J. VAN ZANT, ESQUIRE