

# ARGUMENT DOCKET

No. 35465

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

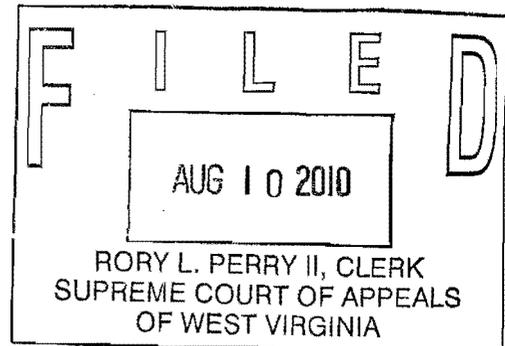
STATE OF WEST VIRGINIA,

Plaintiff Below/Appellee

v.

SANDY MARTIN COOK,

Defendant Below/Appellant



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APPELLANT'S REPLY BRIEF

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Submitted by:

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## ADDITIONAL STATEMENT OF FACTS

In the State's statement of facts they refer to the motive of collusion between these alleged victims as well as the victim identified by the State as Michelle L.'s attempts to take over as pastor of Mr. Cook's church in Shrewsbury, Brief of Appellee p. 6. These were indeed referred to in the case below as motives. Since this appeal was filed, all three have hired the same attorney to sue not only Mr. Cook, but also the Church of God, a Tennessee corporation, alleging various torts and seeking punitive damages. None of the torts as alleged occurred during the period of limitations. Further, those pleadings appear to have allegations which are contradictory to their testimony. More significantly, these pleadings, as first served upon Mr. Cook only a few weeks ago, are identified as Kanawha County Civil Actions 09-C-1229 (Michael Bradley, as the named plaintiff), 09-C-1230 (Jose Strickland), 09-C-1231 (Michael Lewis) and 09-C-1232 David Mullins as the Plaintiff. Mullins is Lewis' cousin and the accuser whose counts were nollied by the State after he testified at a pre-trial hearing in a manner which differed from the accusations contained in the indictment, Transcript 193, 206-207.

Civil actions brought after a criminal conviction follow a familiar pattern today, particularly so when a church or school can be named as a defendant. They also provide a motive - money damages such as these for alleged severe emotional distress, psychological injuries and bills, diminished incomes and alleged embarrassment, none of which was supported either by trial evidence or the victim impact statements.

## **STANDARD OF REVIEW**

The Appellant disagrees with the State's standard of review as stated, insofar as it relates to the delays in prosecution, Brief of Appellee p 7. Where the error below involves a procedure or right which is guaranteed by the U.S. Constitution, the error is either per se reversible or the State must show and this Court must find harmless error beyond a reasonable doubt, see discussion pp. 2-6 infra. Contrary to the State's assertion, the case of State v. Ayers, 168 W.Va. 137, 282 S.E.2d 876 (1981) does not apply, see Brief of Appellee p. 7. In Ayers the defendant complained of a four month delay between commission and indictment in a drug case. The defendant argued that the passage of four months deprived him of the ability to establish his alibi. Ayers simply holds that the trial judge did not abuse his discretion when he denied an instruction about his inability to account for his whereabouts after a four month delay.

Mr. Cook's case involves a fundamental constitutional right and a newly-announced procedure for addressing that right. The Chapman v. California decision and its progeny therefore apply, 386 U.S. 18 (1967). Decisions about interpretation of the law are always subject to a de novo review.

### **THE STATE HAS FAILED TO ADDRESS OR TO MEET ITS BURDEN IN THIS APPEAL**

Mr. Cook has been deprived of a fundamental right below. That deprivation is front and center in this appeal. Moreover, barely one year ago this Court addressed this most fundamental of rights - the right to a fair trial under Due Process of Law as protected by our U.S. and State Constitution State ex rel. Knotts v. Facemire, 223 W.Va. 594, 678 S.E.2d 847 (2009).

Where the error below involves procedures and rights guaranteed by the U.S. Constitution such as was addressed in Knotts and addressed herein, one of the two standards must be applied when considering the appeal: (1) either the error is reversible per se; or (2) the error is not reversible if it is deemed to be *harmless beyond a reasonable doubt*, Chapman v. California, 386 U.S. 18 (1967).

“Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.” Id. at 24.

In its prior opinions this Court has found that a defendant’s absence from an in camera hearing deprives an accused of his fundamental right to be present at trial. Likewise, giving a burden-shifting alibi instruction to the jury also deprives the accused of a fundamental right. These require that the State must establish beyond a reasonable doubt that the error did not contribute to the conviction, State ex rel. Grob v. Blair, 158 W.Va. 647, 214 S.E.2d 330 (1975); Morrison v. Holland, 177 W.Va. 297, 352 S.E.2d 46 (1986); see also State v. Boyd, 160 W.Va. 234, 233 S.E.2d 710 (1977). This Court has stated in the clearest of terms that:

“Errors involving deprivation of Constitutional rights will be regarded as harmless only if there is no reasonable possibility that the violation contributed to the conviction.” State v. Thomas, 157 W.Va. 640, 203 S.E.2d 859 (1985).

More recently, this Court has reaffirmed the above principle while noting that this issue necessarily implicates the harmless error rule as found in Rule 52(a) of our Rules of Criminal Procedure, State v. DeWeese, 213 W.Va. 339, 582 S.E.2d 786, 799 (2003).

The State's argument implicitly acknowledges that this appeal involves the deprivation of due process but argues that Mr. Cook has not demonstrated any prejudice. The State however fails to address the proper standards for judging this appeal, Brief of Appellee pp. 8-17. The State therefore not only avoids the all-important issue but the State fails to meet its burden.

**THE RIGHT TO A FAIR TRIAL IN  
WHICH THE ACCUSED CAN  
MEANINGFULLY CONFRONT AND  
CROSS-EXAMINE WITNESSES,  
SUBPOENA WITNESSES ON HIS BEHALF,  
INVOKE HIS RIGHT OF SILENCE IF HE  
CHOOSES, AND HAVE THE BENEFIT  
OF EFFECTIVE ASSISTANCE OF COUNSEL  
IS SO BASIC THAT THEIR INFRACTION  
IS NEVER HARMLESS**

The U.S. Supreme Court has consistently stated that there are some constitutional rights which are so basic to a fair trial that their violation can never be treated as harmless error, Chapman v. California, 386 U.S. at 23; Arizona v. Fulminante, 499 U.S. 279 (1991); Neder v. U.S., 527 U.S. 1 (1999); see also Morrison v. Holland, *supra* fn. 4. The question presented is whether the constitutional right which is violated can be deemed to so infect the entire trial as to render the process fundamentally unfair. Cases have found such fundamental unfairness when the State offers as evidence an involuntary confession, Payne v. Arkansas, 356 U.S. 560 (1958); Arizona v. Fulminante, *supra*. That has also been the result when the accused has been denied

the right to counsel, Gideon v. Wainright, 372 U.S. 335 (1963) and when the judge is not impartial, Tumey v. Ohio, 273 U.S. 510 (1927). It is submitted that this principle applies to Mr. Cook's appeal.

Contrary to the State's argument that Mr. Cook has not shown substantial, actual prejudice, Brief of Appellee 12-17, what is abundantly clear is that Mr. Cook was deprived of vital defense witnesses due to the passage of time. In fact, his mother not only was living in the home at times when the alleged crimes were said to have occurred but she was a friend to the accusers. Indeed, the evidence was that she was like a mother to one of them (accuser Lewis). Mrs. Cook was but one of four witnesses who had died during the lengthy delay. This included two witnesses who possessed key knowledge about the early version of an accusation and the church-sponsored meeting with accuser Bradley, a version of the alleged facts which changed over time. The State's argument seeks to trivialize this most basic characteristic of a fair trial. Their argument trivializes proper practices which are intrinsic to a meaningful trial proceeding such as the ability of counsel to demonstrate from the physical layout of a premises why the accusations are unlikely, to show what the demeanor of an accuser was at a critical point in time or even to present something so basic as a description of people or circumstances at the temporally relevant times rather than two decades later. The passage of such an inordinate amount of time renders it necessary that the accused testify at trial and robs counsel of tools needed to provide an effective defense.

There is little, if any, qualitative difference between having a judge who is not impartial to having a lawyer who is unable to call critical witnesses because they are dead, senile, have

disappeared, or whose identities are long forgotten. There is little difference between rendering counsel ineffective and having no attorney at all. Further, there is little difference between compelling an accused to testify because his only defense is his denial and using a coerced confession. Mr. Cook's rights, as deprived in this case, are of such fundamental nature that reversal of his conviction cannot be characterized as merely harmless as the State might wish to have this court conclude.

**THE STATE HAS FAILED TO  
ADDRESS THE ESSENTIAL ISSUE  
IN THIS APPEAL AND IN THE  
PROCESS ASKED THIS COURT  
TO RESTORE HUNDLEY v. ASHWORTH**

The Court's opinion in State ex rel Knotts v. Facemire, 223 W.Va. 594, 678 S.E.2d 847 (2009) was handed down on June 5, 2009. Mr. Cook was presenting his arguments in favor of dismissal to the trial court less than 4 months previously. The trial court made its ruling based on precedent which Knotts overruled. The trial judge remarked that "perhaps at some point...our courts will give us some type of guidance on that type of delay" [delay where there is no prosecutorial effort to gain a tactical advantage] T 141. It is submitted that the application by the trial court of the Knotts principles following an evidentiary hearing represents the essential issue in this appeal. In fact, it is submitted that Mr. Cook is entitled to have his conviction reversed and the matter remanded on that grounds even if that is the only error below.

Instead of addressing the principles which are set out in syllabus points 2, 3 and 4 of Knotts or the fact that Knotts had not been decided, therefore was not considered by the trial

judge below, the State has argued that Mr. Cook's due process rights were not violated.

Curiously, notwithstanding the specific language in Knotts, the State argues that there was no state action involved in the delay, Brief of Appellee 8-12. The requirement that the State had to be involved in causing the delay was specifically rejected when this Court overruled Hundley v. Ashworth and its progeny, Knotts, syl.pts. 2 and 3. Yet the State would have this Court resurrect such a requirement by suggesting that there can be no 14<sup>th</sup> Amendment violation if the State did not cause the delay.

The flaws in the State's argument concerning the absence of "State action" are both glaring and basic. First, contrary to the suggestion that Fifth Amendment due process is not implicated, Brief of Appellee p. 9, the Knotts opinion itself refers to that very constitutional provision. Moreover, the Fifth Amendment's protection was deemed to be incorporated into the Fourteenth Amendment as long ago as 1964, see Malloy v. Hogan, 378 U.S.1. Second, the State's argument is contrary to the principle that criminal prosecutions belong to the State, not to individuals.

"It is rudimentary to state that the law recognizes only the interest of a citizen in felony prosecutions as a part of the body politic, and not as an individual."  
State v. Riffe, 127 W.Va. 573, 34 S.E.2d 21, 23 (1945).

It is therefore error to argue that the State is somehow not involved. The State is the named party. The State's agents brought the charges and prosecuted the case. The State now holds Mr. Cook as a prisoner in its facility. It follows that any violation of rights is a violation by the State.

The argument presented by the State in this regard cannot be supported by authority from civil cases involving procedural due process as the State would have it. Nor is it supported by common sense.

A careful reading of the State's argument, Brief of Appellee pp. 9-12, results in but one conclusion. The State is actually urging a return to the requirement in Hundley v. Ashworth that the defendant must prove that the delay was a deliberate device by the State to gain some advantage over the defendant. Stated another way, the State is seeking to overturn Knotts before those who are accused of such distant and stale accusations as these have had the opportunity to participate in evidentiary hearings based upon the principles of Knotts. Which is precisely what Mr. Cook seeks in this case.

**THE TERM "CUSTODIAN" WOULD NOT  
HAVE EMBRACED THE CONDUCT  
ALLEGED AND UPON WHICH MR. COOK  
STANDS CONVICTED FOR ACTS SAID TO  
HAVE OCCURRED IN THE TIME FRAME  
OF 1991 TO 1993**

The State argues that no ex post facto application of a changed definition of "custodian" exists in this case, Brief of Appellee pp. 17-18. However, during the time period of 1991-1993, W.Va. Code §61-8D-1(4) defined "custodian" as including:

...a person over the age of fourteen years who has or shares actual physical possession or care and custody of a child on a full-time or temporary basis, regardless of whether such person has been granted custody by any contract, agreement or legal proceeding."

Similarly, the child abuse and neglect statute then defined “custodian” as

“a person who has or shares actual physical possession or care and custody of a child, regardless of whether such person has been granted custody of the child by any contract, agreement or legal proceedings.”

W.Va Code §49-1-5(5) [Re-enacted and amended 49-1-3]

In 1987, this Court held that this language did not apply to a school teacher, W.Va. Dept of Human Services v. Boley, 358 S.E.2d 438. That authority was the only interpretation of “custodian” until 1999 when this Court decided State v. Stephens, 206 W.Va. 420, 525 S.E.2d 301. The Stephens concept of babysitter as custodian provided the foundation for the State’s argument that Mr. Cook was a custodian during a time when there was no Stephens decision.

This error found its way into the prosecution’s cross-examination of Mr. Cook. Here the State contends that Mr. Cook’s argument on this point is really no more than an assertion, a skeletal argument lacking authority, Brief of Appellee p. 21. On the contrary, the prosecutor’s questions formulated on the legal definition of “care, custody and control” is central to an element of the crimes charged, constitute an effort by the State to have Mr. Cook admit to some parental role at times when these accusers claim they were passengers in his vehicle. In summary, in 1991-1993 Mr. Cook could not have been deemed to be a “custodian” of passengers in his vehicle under the then existing law. Therefore, to permit him to be convicted in 2009 based upon concepts not extant in 1991-1993 contravenes due process of law and does indeed represent a prosecution based upon ex post facto legal concepts.

**THE STATE'S ASSERTION  
CONCERNING "SKELETAL  
ARGUMENTS" IS UNFOUNDED**

The State repeatedly discusses Appellant's arguments by confidently stating that the arguments are too short or that no authority is cited, Brief of Appellee pp. 19, 20, 21. In fact, at one point the State smirks that "the only authority he [counsel] cites is himself," p. 19. These assertions will be addressed in seriatim.

Accuser Strickland had allegedly told the State that he had been the victim of anal sex which formed the basis of Counts 7 and 8. Because his statements changed, those Counts were dismissed. Counsel attempted to raise their dismissal unsuccessfully both in his opening remarks and when cross examining Strickland, & 224, 268, 260-270 (by avowal Strickland admitted that he had changed his testimony as to the accusations). There is little need to cite authority for the admissibility of a prior inconsistent statement made by an accuser against the accused. However, in that the State has raised the subject, Mr. Cook relies upon the Rules of Evidence, particularly Rules 613 and 801.

"A prior inconsistent statement...is, offered to  
raise an inference as to the poor general  
credibility of the witness as to all his testimony"

Cleckley. Handbook of Evidence for West Virginia  
Lawyers (3d Ed) p. 126; see also cases cited therein.

The effect of the trial court's error is not supported and is in fact increased by the Court's reasoning when the court disallowed any mention of the dismissed counts in opening remarks.

Consider also the dismissal of the Mullins accusations. If this ruling were designed to "achieve a

desirable end” as the State argues, Brief of Appellee, p. 20, then the ruling would be to admit this evidence especially during cross-examination of one whose story had so dramatically changed.

The same impeachment rule as to inconsistent statements made by accuser Bradley applied, an error which would be plain even if not objected to, T 500-501.

The testimony about the church meetings wherein accuser Lewis displayed his animus towards Mr. Cook would constitute relevant evidence, Rule 401, Rules of Evidence. The accuser’s motives, his animus towards the accused are always admissible as they represent quintessential relevance. This requires further citation of authority.

The trial Court erred in disallowing an examination into Mr. Cook’s reputation as a law abiding citizen, Brief of Appellee, p. 20. The previous errors in precluding argument or evidence fall within the same category as this error.

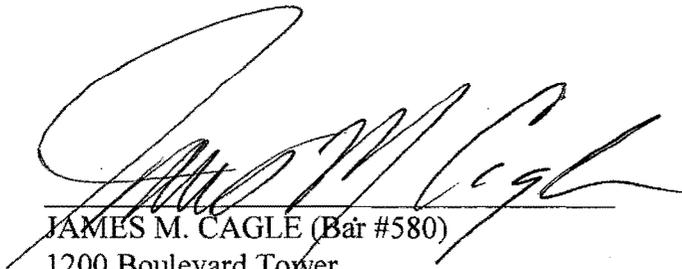
The Appellant agrees that discretion is given to the trial Court for determining whether the scope of cross-examination has been violated, State v. Richey, 171 W.Va. 342, 298 S.E.2d 879 (1982). However, ordinarily the scope is limited to facts and circumstances connected with statements listed on direct examination. The trial Court abused its discretion in this connection.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Brief of Appellant, Mr. Cook's conviction should be reversed by this Honorable Court.

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Plaintiff Below/Appellee

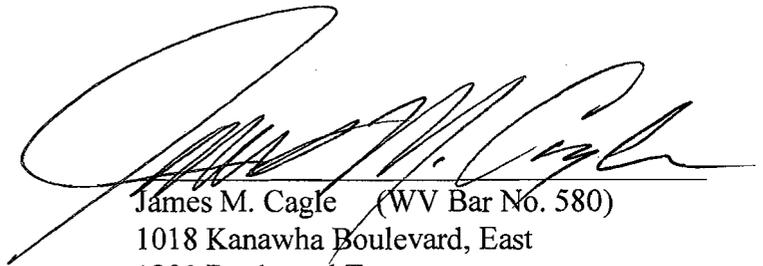
v.

SANDY MARTIN COOK,

Defendant Below/Appellant

**CERTIFICATE OF SERVICE**

The undersigned, James M. Cagle, counsel for the Defendant/Appellant, Sandy Martin Cook, does hereby certify that a true and correct copy of the Appellant's Reply Brief was served by first-class mail, postage prepaid to Barbara H. Allen, Managing Deputy Attorney General, last-known address of Office of the Attorney General, State Capitol, Room 26-E, Charleston, WV 25305, on this the 10th day of August, 2001.



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