

**FILED**

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RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

Starcher, J., dissenting:

The majority opinion is a meandering foray that laboriously navigates a number of jurisprudential seas. Such laboriousness, string citing, the dropping of estimable jurisprudential names, etc. alerts the reader to the oft-combined strategies of numbing and bolstering, in the service of concealing a moral and legal flaw.

Here, the moral and legal nugget to be jurisprudentially shrouded and clouded is the fact that *the police deliberately concealed* from this suspect the fact that he had a lawyer and that the lawyer had demanded that the suspect be advised not to say anything.

The majority opinion's ruling is that if the police can colorably claim that a person is not "in custody," it's okay for the police to lie about what a person's lawyer has told the police. Bob Dylan wrote in "Hurricane," "It makes you feel ashamed, to live in a land where justice is a game." I feel the same way about the majority opinion.

There are dozens of people who have been freed from death row by DNA evidence who gave an incriminating statement to the police. Where a person is in an incommunicado<sup>1</sup> state – like this defendant was – many people will eventually say what the police want to hear.

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<sup>1</sup>The police refused to tell him of his lawyer's communication. They would not let him have his cell phone on. This is being incommunicado.

In the instant case, the defendant's statement in question probably had little to do with his conviction. The majority is willing to overlook egregious and shameful misconduct by the police because it appears that the defendant is guilty and the majority is unwilling to put the state (and the victim) through another trial. I sympathize with this position, and I might be willing to treat the admission of the statement as harmless error. But I am not willing to go along with allowing the police to lie to suspects and lawyers, and to keep suspects incommunicado.

Accordingly, I dissent.