

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

TIMOTHY MICHAEL WALDRON, Petitioner, v. STATE OF WEST VIRGINIA,  
Respondent.

DOCKET NO: 11-0399

Wood County Circuit Court  
Case No: 09-F-206  
The Honorable Judge Jeffrey B. Reed

**PETITIONER'S REPLY BRIEF**

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## ARGUMENT

1. **The Court erroneously relied on the reasoning and holding in *State v. Dillon* 191 W.Va. 648 , 447 S.E.2d 583 to allow the admission of the video and audio recordings of the alleged drug transaction without the testimony of the confidential informant, the only witness to the alleged drug transaction, at trial. Although *State v. Dillon* has not been overturned by this Court the decision is pre-*Crawford v. Washington* 547 U.S. 813, 126 S.Ct 2266 (2006) and begs a further analysis to determine the present constitutionality of its application. In allowing the audio and video recordings to be admitted without testimony by the confidential informant violated the Defendant's Sixth Amendment Constitutional Right to confront and cross examine all witnesses against him at trial.**

The Respondent in it's Response to the Petitioner's Petition for Appeal argues "In this case, the CI's recorded statements were not admitted for the truth of the matter asserted." (Response Brief pg. 18) The Respondent argues "[t]o the extent *Dillon* relies upon this rule it is still good law; neither *Crawford* nor *Mechling* are relevant. (See *Crawford*, 541 U.S. at 42 (the "confrontation clause does not bar the use of out of court testimonial statements for the purposes other than establishing the truth of the matter asserted"))" (Response Brief pg. 19)

The Petitioner would strenuously argue the CI's statements were introduced for the truth of the matter asserted. The audio and video of the alleged drug transaction were the only evidence admitted at trial. In this case the CI never identified Mr. Waldron as the person who sold him narcotics during this alleged drug transaction. Officer Doug Sturm testified as follows:

Q. Did you ever has the confidential informant come in and try to identify the person in the video?

A. Not that I – not that I can recall, ma'am.

Q. So is it not that you can recall, or, no it didn't happen?

A. Not that I can recall bringing him in, non, ma'am.

Q. But it –

A. He did not come in to my recollection---

Q. Okay

A. --- if that's what your looking for.

Q. But did you or any other agent ever attempt to bring in the confidential informant to identify Mr. Waldron on the video or in the photographs?

A. I don't believe so, no. ma'am. (Trial Tr. Pgs. 29-30)

According to Agent Strum's testimony no agent of the Parkersburg Narcotics Task Force ever had the confidential informant identify the Defendant Michael Waldron as the person who delivered/ sold marijuana to the CI on the night in question. The video and audio were admitted into evidence as truth of the matter asserted. As in this case there was no other evidence. Agents of the Narcotics Task Force were able to then testify at trial as to the fact they believed the person in the audio and video was Mr. Waldron based on their investigation.

Michael Waldron's right to confront his accuser and cross exam his accuser under the Constitution of the United States of America was denied. There was never an identification by the CI that Michael Waldron sold him the marijuana prior to trial. There was never an identification by the CI that Michael Waldron was the person who sold him marijuana on the night in question at trial. The evidence presented at trial for the truth of the matter asserted was the audio and video taken by the Parkersburg Narcotics Task Force along with the speculative

identification of Mr. Waldron as the person in the video and audio by members of the Parkersburg Narcotics Task Force.

In fact Agent DeWeese testified at trial as follows:

Q. Agent DeWeese were you sometime --- at some point after May 4<sup>th</sup> of 2009, wre you then told by Off. Strum that the while male known as Tim was somebody by the name of Timothy Waldron?

A. I remember reading it in the case file afterwards but I don't think we spoke directly about it.

Q. And that is the only way that--- and that's how you -- what you based your identification on today?

A. Yes

Q. Was reading it in the case file?

A. I believe there were case files and there were some photos of some sort.

Q. Okay . And did you yourself after doing the video surveillance on May 4<sup>th</sup> of 2009 do any other investigation or work on this case?

A. I don't think so, no. (Trial Tr. Pgs. 238 – 239)

If this Court is to allow this type of testimony to stand it seems this Court is starting down a slippery slope of police investigation and the duty place on the police to collect evidence during criminal investigations. If this conviction is to stand, all the police need to do in any drug related crime from this point forward is set up a controlled buy, take some video surveillance in which it is somewhat difficult to actually see the faces of the people involved, then have some almost inaudible audio of the drug transaction, don't have the CI ever actually identify the person who the police chose to charge with the crime, look through photographs at the police

department pick a person who looks similar to the person in the video, arrest them, place them in jail, obtain an indictment, set a trial date, don't look for the CI, then allow the police to testify at trial they believe the person in the video is the Defendant. The flood gates will open to questionable criminal investigations into drug related crimes.

**II. The lower court erred by denying the Defendant's Motion for Directed Verdict at the end of the State of West Virginia's case in chief as the evidence presented by the State of West Virginia clearly established overwhelming evidence of entrapment.**

The Petitioner stands on his previously submitted argument.

**III. The lower court erred in refusing the Defendant's request for a jury instruction on entrapment when the Defendant offered some competent evidence of entrapment to require the prosecution to prove beyond a reasonable doubt that the Defendant was otherwise predisposed to commit the offense.**

The Petitioner stands on his previously admitted argument.

**IV. The lower court erred by allowing Task Force officers to make an in-court identification of the Defendant's voice on the audio recordings of the alleged controlled buy.**

The Petitioner stands on his previously admitted argument.

**V. The lower court erred by admitting the drug evidence in this matter when the State of West Virginia did not establish a proper chain of custody as the confidential informant never testified that the marijunan admitted was the marijuana they received from the Defendant. The State offered no evidence that the marijuana admitted into evidence at trial ever came from the Defendant.**

The Petitioner stands on his previously admitted argument.

**V. The lower court erred in finding the State of West Virginia had no duty to disclose the photographs and/or information used by the Parkersburg Narcotics Task Force to identify the Defendant under W.Va. Rules of Criminal Procedure Rule 16 or *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963).**

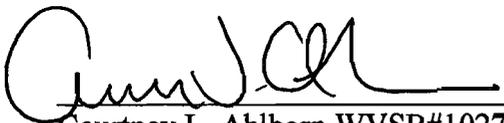
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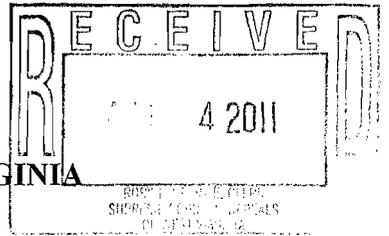
**VII. Conclusion**

The undersigned counsel, on behalf of the Defendant, implores the Supreme Court of Appeals to consider this reply on behalf of the Petitioner. Counsel has attempted to response to the Respondent's Response Brief and would like the opportunity to further brief the Court after oral arguments on these and any other issues that the Court, after its review of the record, deems important or necessary. This case was a travesty of justice, and the Court should hear this matter and, thereafter, reverse the pre-trial rulings of Judge Jeffrey B. Reed and the jury verdict of guilty and order that the Defendant be released from incarceration.

TIMOTHY MICHAEL WALDRON,

By Counsel.

  
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STATE OF WEST VIRGINIA,

Plaintiff below,  
Respondent,

v.

PETITION NO. 11-0399

TIMOTHY MICHAEL WALDRON,

Defendant Below  
Petitioner.

**CERTIFICATE OF SERVICE**

I, Courtney L. Ahlborn, do hereby certify that on July 29, 2011, I served a true copy of the hereto annexed **PETITIONER'S REPLY BRIEF** to all parties of record in the above referenced matter by United States Mail, first class, postage prepaid, at the following address:

Robert D. Goldberg, Asst. Attorney General  
Attorney General's Office  
State Capital, Room E-26  
Charleston, WV 25305

  
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Courtney L. Ahlborn