

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
NO. 11-0120 and 11-0457

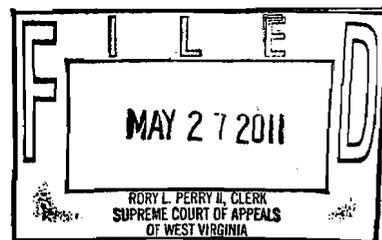
STATE OF WEST VIRGINIA,

*Plaintiff Below, Respondent,,*

v.

PAULA D. HOSTON and REESE T. RILEY,

*Defendants Below, Petitioners.*



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RESPONSE BRIEF OF THE STATE OF WEST VIRGINIA

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DARRELL V. McGRAW, JR.  
ATTORNEY GENERAL

THOMAS W. RODD  
ASSISTANT ATTORNEY GENERAL  
812 Quarrier Street, 6th Floor  
Charleston, West Virginia 25301  
Telephone: (304) 558-5830  
State Bar No. 3143  
E-mail: [twr@wvago.gov](mailto:twr@wvago.gov)  
*Counsel for Respondent*

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*Defendants Below,  
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RESPONSE BRIEF OF THE STATE OF WEST VIRGINIA

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Comes now the State of West Virginia, the Respondent, by counsel, Assistant Attorney General Thomas W. Rodd, and files the within brief in response to the petitions for appeal.

I.

STATEMENT OF THE CASE

The instant proceeding before the West Virginia Supreme Court of Appeals consolidates two petitions for appeal, State v. Hoston, Case. No. 11-0120 and State v. Riley, No. 11-0457.

In Case No. 11-0120, the Petitioner Paula D. Hoston has appealed her two felony drug convictions. These convictions were based upon conditional pleas of guilty in the Circuit Court of Mercer County, pursuant to a plea agreement in which the Petitioner Hoston reserved the right to challenge the convictions on appeal on the grounds that the evidence against her—evidence that was obtained by the use of a surreptitious “body wire” recording in her home—was inadmissible as the

result of an illegal search and seizure. (Hoston App. 1-8.) The Petitioner Hoston contends that the magistrate who approved the surreptitious use of a “body wire” in the Petitioner Hoston’s home did not have legal authority to do so. In an order dated November 20, 2010, the circuit court denied the Petitioner Hoston’s Motion to Suppress that evidence. (Hoston App. 9-14.)

Thus, the sole issue before the West Virginia Supreme Court of Appeals in Case No. 11-0120 is whether the circuit court’s November 20, 2010, Order Refusing to Suppress Evidence was erroneous. If the November 20, 2010 order was erroneous, the Petitioner Hoston’s plea of guilty and her convictions must be set aside and her case remanded to circuit court. If the order was correct, the Petitioner Hoston’s convictions must be affirmed.

In Case No. 11-0457, the Petitioner Reese T. Riley has appealed three felony drug convictions. These convictions were based upon conditional pleas of guilty in the Circuit Court of Mercer County pursuant to a plea agreement in which the Petitioner Riley reserved the right to challenge the convictions on appeal on the grounds that the evidence against him—evidence that was obtained by the use of a surreptitious “body wire” recording in his home—was inadmissible as the result of an illegal search and seizure. (Riley App. 1-7.) The Petitioner Riley contends that the magistrate who approved the surreptitious use of a “body wire” in the Petitioner Riley’s home did not have legal authority to do so. In an order dated November 22, 2010, the circuit court denied the Petitioner Riley’s Motion to Suppress that evidence. (Riley App. 8-13.)

Thus, the sole issue before the West Virginia Supreme Court of Appeals in Case No. 11-0457 is whether the circuit court’s November 22, 2010, Order Refusing to Suppress Evidence was erroneous. If the November 22, 2010, order was erroneous, the Petitioner Riley’s plea of guilty and

his convictions must be set aside and his case remanded to circuit court. If the order was correct, the Petitioner Riley's convictions must be affirmed.

## II.

### SUMMARY OF ARGUMENT

The Circuit Court of Mercer County's November 20, 2010 and November 22, 2010 orders, which are essentially identical in their reasoning and holdings, were not erroneous. The circuit court did not err in concluding that the provisions of W. Va. Code § 62-1D-1 (1987), *et seq.*, and not those of W. Va. Code § 62-1F-1 (2007), *et seq.*, apply to the evidence obtained by the use of a body wire in the Petitioners' homes. The circuit court also did not err in holding that the provisions of W. Va. Code § 62-1F-1 (2007), *et seq.*, allowing a magistrate to issue an order authorizing the in-home recording of conduct or communications using a body wire, are not unconstitutional. The Petitioners' convictions should therefore be affirmed.

## III.

### STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent does not believe that the instant proceeding requires oral argument.

## IV.

### STATEMENT OF FACTS

It is not necessary to set forth the detailed facts of, or the supporting evidence relating to, the incidents and charges that led to the Petitioners' convictions. Both of the Petitioners' challenges to the circuit court's orders are based on a purely facial challenge to the application of the provisions of W. Va. Code § 62-1F-1 (2007), *et seq.*

West Virginia Code § 62-1F-1 (2007), *et seq.* authorizes magistrates and circuit judges to issue orders that authorize law enforcement and/or their informants, when present in a home, to surreptitiously use a concealed “body wire” recorder or other transmitter device to record conduct and/or oral communications in the home—if probable cause is established by affidavit to a magistrate or judge to believe that such recording would provide evidence of criminal conduct.<sup>1</sup>

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<sup>1</sup>W. Va. Code §62-1F-1 (2007) states:

(a) For the purposes of this article, the following terms have the following meanings:

(1) “Body wire” means: (a) an audio and/or video recording device surreptitiously carried on or under the control of an investigative or law-enforcement officer or informant to simultaneously record a nonconsenting party's conduct or oral communications; or (2) radio equipment surreptitiously carried on or under the control of an investigative or law-enforcement officer or informant to simultaneously transmit a nonconsenting party's conduct or oral communications to recording equipment located elsewhere or to other law-enforcement officers monitoring the radio transmitting frequency.

(2) “Home” means the residence of a nonconsenting party to an electronic interception, provided that access to the residence is not generally permitted to members of the public and the nonconsenting party has a reasonable expectation of privacy in the residence under the circumstances.

(3) “Informant” means a person acting in concert with and at the direction of a law-enforcement officer in the investigation of possible violations of the criminal laws of this state or the United States.

(4) “Investigative or law-enforcement officer” means any officer empowered by law to conduct investigations of or to make arrests for criminal offenses enumerated in this code or an equivalent offense in another jurisdiction.

(5) “Electronically intercept” or “electronic interception” mean the simultaneous recording with a body wire of a nonconsenting party's conduct or oral communications in his or her home by an investigative or law-enforcement officer or informant who is invited into the home and physically present with the nonconsenting party in the home at the time of the recording.

(b) Words and phrases that are not defined in this article, but which are defined in article one-d of this chapter, shall have the same meanings established in article one-d unless otherwise noted.

Specifically, W. Va. Code § 62-1F-2 (2007) requires that in order to surreptitiously use a body wire in a home, law enforcement must:

*obtain from a magistrate or a judge of a circuit court within the county wherein the nonconsenting party's home is located an order authorizing said interception. The order shall be based upon an affidavit by the investigative or law-enforcement officer or an informant that establishes probable cause that the interception would provide evidence of the commission of a crime under the laws of this state or the United States.*

(Emphasis added.)

In the instant cases, the Petitioners do not challenge the merits of the prosecution's showing, before the magistrates who authorized the use of body wires in the Petitioners' homes, that there was probable cause to believe that the use of a body wire in the Petitioners' homes would provide evidence of the commission of a crime under the laws of this state or the United States. The Petitioners have stipulated that law enforcement made a sufficient showing of probable cause to the magistrates to justify orders permitting the use of a body wire in the Petitioners' homes.

Rather, the Petitioners' challenge is solely to the statutory and constitutional authority of the magistrates to issue the orders. The Petitioners contend that only a judge who has been specially designated to issue electronic surveillance orders pursuant to the provisions of the "West Virginia Wiretapping and Electronic Surveillance Act," W. Va. Code § 62-1D-1 *et seq.* ("The Wiretapping Act"), has the statutory and constitutional authority to issue orders authorizing in-home electronic interception or recording of conduct or communications using a body wire.

The Circuit Court of Mercer County, in denying the Petitioners' Motions to Suppress the Evidence that was obtained by the recordings that the magistrates in the instant case authorized,

addressed both the statutory and constitutional arguments raised by the Petitioners. In summarizing and responding to the Petitioners' statutory arguments, the circuit court stated:

[The Petitioners'] main contention is that W. Va. Code § 62-1F-1 (2007), *et seq.*, conflicts with W. Va. Code §62-1D-1, *et seq.*, thereby rendering magistrates powerless to issue Orders for electronic interceptions.

(Hoston App, 9, Riley App, 8).

However, the legislature specifically excepted Article 1F from the strictures of Article 1D. Specifically, W. Va. Code § 62-1D-3(f) (1987) states:

[n]otwithstanding the provision of this article or any other provision of law, an electronic interception as defined by section one, article one-f of this chapter, is regulated solely by the provisions of article one-f of this chapter, and no penalties or other requirements of this article are applicable.

Further demonstrating the lack of statutory conflict between Articles 1D and 1F is the legislative history of W. Va. Code §62-1F-1, *et seq.* The history establishes that the legislature contemplated and intended Articles 1D and 1F to operate independently: W. Va. Code §62-1F-1, *et seq.*

... "an act to amend and reenact §62-1D-3, of the Code of West Virginia, 1931, as amended; and to amend said code by adding thereto a new article, designated §62-1F-1, §62-1F-2, §62-1F-3, §62-1F-4, §62-1F-5, §62-1F-6, §62-1F-7, §62-1F-8 and §62-1F-9, all relating to electronic interception of a non-consenting party's conduct or oral communications in his or her home by an investigative or law enforcement officer or an informant invited into said home; excepting electronic interceptions of a non-consenting party's conduct or communications occurring in his or her home from the wiretapping and electronic surveillance act. . .

WV LEGIS 2 ES 11 (2007). Thus, through the explicit exclusionary language of § 62-1D-3(f), the legislature implemented its intent for independent statutory construction and independent application of Articles 1D and 1F. Moreover, the language of §62-1D-3(f) unequivocally removes Article 1F from the dictates and constraints of Article 1D, thereby fully employing the provisions of Article 1F.

(Hoston App, 10-11, Riley App, 9-10.)

In summarizing and responding to the Petitioners' constitutional arguments, the circuit court stated:

[T]he defendant erroneously relies on *State v. Mullens*, 221 W. Va. 70, 650 S.E.2d 169 (2007) to support [her/his] argument that W. Va. Code § 62-1D-1 (2007), *et seq.* and W. Va. Code § 62-1F-1, *et seq.*, . . . [is] unconstitutional. In *Mullens*, the West Virginia Supreme Court of Appeals . . . recognizing the sanctity afforded a person in his own home, directly addressed the constitutionality of police using an informant with an electronic surveillance device while in the home of a suspect. After a detailed analysis of State and Constitutional law, our Court held such surveillance unconstitutional unless it had been *judicially authorized*. Our Court pronounced:

[o]ur ruling today merely limits the one-party consent provision of the Act from being used to send an informant into the home of a suspect to record communications therein without having obtained a search warrant authorizing such conduct. Therefore we hold that, Article III, § 6 of the West Virginia Constitution prohibits the police from sending an informant into the home of another person under the auspices of the one-party consent to electronic surveillance provisions of W. Va. Code § 62-1D-3(b)(2) (1987) (Repl. Vol. 2005.) where the police have not obtained prior authorization to do so pursuant to W. Va. Code § 62-1D-11 (1987) (Repl. Vol. 2005).

*Mullens*, 221 W. Va. 70, 650 S.E.2d 169. Significantly, the Legislature enacted W. Va. Code § 62-1F-1, *et seq.*, in direct response to the *Mullens* decision. Through the provisions implemented in Article 1F, the legislature cured the constitutional issues articulated by our Court in *Mullens*. Furthermore, *Mullens* did not outright declare the electronic surveillance provisions of W. Va. Code § 62-1D-3 to be unconstitutional; rather, our Court premised the constitutionality on whether a judge had issued a search warrant authorizing an informant to enter a suspect's home with a recording device. For these reasons, the electronic surveillance conducted in the instant matter pursuant to a warrant issued under W. Va. Code § 62-1F-1, *et seq.*, was constitutionally valid under the statutory provisions as well as the *Mullens* standard.

#### Conclusion

Accordingly, the Court finds that the electronic surveillance conducted in the instant case was properly approved by a magistrate, conformed to the requirements set forth in Article F, and passed constitutional muster under both the *Mullens* decision and the pertinent statutory provisions.

(Houston App, 12-13, Riley App, 11-12.)

V.

ARGUMENT

**A. THE CIRCUIT COURT OF MERCER COUNTY DID NOT ERR IN CONCLUDING THAT THE PROVISIONS OF W. VA. CODE § 62-1F-1, *ET SEQ.*, AND NOT W. VA. CODE § 62-1D-1, *ET SEQ.*, THE WIRETAPPING ACT, APPLIED TO THE USE OF A BODY WIRE IN THE PETITIONERS' HOMES.**

West Virginia Code § 62-1D-1 *et seq.*, the Wiretapping Act, was first passed in 1987, and generally governs the interception and recording of communications by such means as wiretaps on telephone lines, "trap and trace" devices, and "pen registers." *See* W. Va Code § 62-1D-2 (1987).

West Virginia Code § 62-1D-7 (1987) authorizes only members of a specially designated group of circuit judges to issue orders that permit interception and recording that falls under the Wiretapping Act's ambit:

The chief justice of the supreme court of appeals shall, on an annual basis, designate five active circuit court judges to individually hear and rule upon applications for orders authorizing the interception of wire, oral or electronic communication.

*Id.*<sup>2</sup>

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<sup>2</sup>W. Va. Code, § 62-1D-11 (1987) requires a designated judge to issue such an order only upon a finding that:

(1) There is probable cause to believe that one or more individuals are committing, have committed, or are about to commit one or more of the particular offenses enumerated in section eight of this article;

(2) There is probable cause for belief that particular communications concerning such offense or offenses will be obtained through the interception;

(3) Normal investigative procedures have been tried and have failed and reasonably appear to be unlikely to succeed if attempted again, or that to do so would be unreasonably dangerous and likely to result in death or injury or the destruction of property; and

(4) There is probable cause to believe that the facilities from which, or the place where, the wire, oral or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of the offense, or offenses are leased to, listed in the name of, or commonly used by this person.

The orders in the instant case authorizing the surreptitious use of a “body wire” by an informant to record conduct or communications in the Petitioners’ homes were not issued by a judge who had been designated to issue orders under the Wiretapping Act—but rather were issued by a magistrate in the county where the Petitioners’ homes were located. Therefore, the Petitioners argue, the circuit judge should have suppressed the evidence against the Petitioners.

However, as the circuit judge in the instant case held, the provisions of the more recently enacted W. Va. Code § 62-1F-1, *et seq.*—that govern the use of a body wire while present in a home—are explicitly separate and distinct from the provisions of the Wiretapping Act, by the Act’s own terms.

In 2007, when W. Va. Code § 62-1F-1 *et seq.* was enacted, language was also added to the Wiretapping Act, stating that: “[n]otwithstanding the provision of this article or any other provision of law, *an electronic interception as defined by section one, article one-f of this chapter, is regulated solely by the provisions of article one-f of this chapter*, and no penalties or other requirements of this article are applicable.” W. Va. Code § 62-1D-3 (2007). (Emphasis added.) Thus, the provisions of the Wiretapping Act are explicitly no longer applicable to the in-home use of a body wire, which is now “*regulated solely by the provisions of article one-f of this chapter . . . .*” *Id.* And, as previously noted, W. Va. Code § 62-1F-2 (2007) authorizes any judge or magistrate in the county where a home is located to authorize in-home interception and recording using a body wire: “[law enforcement must] first obtain *from a magistrate or a judge of a circuit court* within the county wherein the nonconsenting party’s home is located an order authorizing said interception.” *Id.* (Emphasis added.)

Thus, the use of a body wire to record conduct and communications in the Petitioners' homes was in full compliance with the more-recently-enacted statute that now governs the use of body wires, W. Va. Code § 62-1F-2 (2007).

The Petitioner also relies on this Court's holding in *State v. Mullens*, 221 W. Va. 70, 650 S.E.2d 169 (2007), to support his argument that the circuit judge should have applied the "approval of searches by designated judges only" provisions of the Wiretapping Act to the circumstances of the Petitioners' cases. In *Mullens*, this Court held that in-home surreptitious recording using a body wire was an unconstitutional search or seizure—unless there was judicial authorization for the recording, based upon probable cause. This Court required in Syllabus Point 4 of *State v. Mullens* that the judicial probable cause/authorization provisions of the Wiretapping Act should be followed to render any such electronic surveillance constitutional:

Article III, § 6 of the West Virginia Constitution prohibits the police from sending an informant into the home of another person under the auspices of the one-party consent to electronic surveillance provisions of W. Va. Code § 62-1D-3(b)(2) (1987) (Repl. Vol.2005) where the police have not obtained prior authorization to do so pursuant to W. Va. Code § 62-1D-11 (1987) (Repl. Vol. 2005).

The Petitioner argues that this Syllabus Point from *Mullens* means that approval is required by a judge who has been specially designated under the Wiretapping Act for the use of an in-home body wire.

However, two things have happened since *Mullens* was decided that completely vitiate the force of this argument. First, as shown *supra*, the Legislature has revised W. Va. Code § 62-1D-3 (2007) so that in-home recording using a body wire is explicitly excluded from the ambit of the Wiretapping Act.

Second, the Legislature has set forth a separate statutory mechanism for obtaining probable cause/approval for in-home recording using a body wire—from any judge or magistrate. W. Va. Code § 62-1F-2 (2007). And, as will be shown, *infra*, this probable cause determination mechanism of W. Va. Code § 62-1F-1 (2007), *et seq.*, is constitutionally acceptable. Thus, the use of a body wire to record conduct and communications in the Petitioners' home was in full compliance with the now-applicable statute, W. Va. Code § 62-1F-2 (2007).

For the foregoing reasons, the Petitioners' statutorily-based argument that the circuit judge should have suppressed the evidence obtained against the Petitioners because the use of a body wire was not approved by a circuit judge designated to issue orders under the Wiretapping Act is without merit.

**B. THE CIRCUIT COURT OF MERCER COUNTY DID NOT ERR IN HOLDING THAT THE PROVISIONS OF W. VA CODE § 62-1F-1 (2007), *ET SEQ.*, ALLOWING A MAGISTRATE TO ISSUE AN ORDER AUTHORIZING THE IN-HOME RECORDING OF CONDUCT OR COMMUNICATIONS USING A BODY WIRE ARE NOT UNCONSTITUTIONAL.**

This Court's analysis in *Mullens*, did not specify any particular form of judicial authorization as being required for a finding of probable cause that would permit the constitutionally-acceptable use of a body wire in a person's home. Rather, this Court repeatedly stated in *Mullens*, both directly and by the use of quotations, that it is the fact of independent and impartial judicial authorization that renders the use of a body wire in a home constitutionally permissible:

The instant appeal requires us to decide whether the police can, without prior *impartial judicial authorization*, solicit a person to serve as a confidential informant, equip that person with an electronic surveillance device and send him/her into the home of any citizen the police arbitrarily decide to investigate.

221 W. Va. at 73, 650 S.E.2d at 172 (emphasis added).

The Fourth Amendment does, of course, leave room for the employment of modern technology in criminal law enforcement, but in the stream of current developments in Fourth Amendment law I think it must be held that third-party electronic monitoring, *subject only to the self-restraint of law enforcement officials*, has no place in our society.

221 W. Va. at 77-78, 650 S.E.2d at 176-177 (emphasis added).

Justice Harlan's dissent in *United States v. White* warned against *unsupervised use of government power* to spy on the people. He urged that electronic and false-friend surveillance. . . be permitted only *under the warrant requirements of the Fourth Amendment*, so that government intrusion is possible only if a magistrate agrees with the government that there is probable cause.

....

Because of these possible effects, one might argue that undercover activity should be banned.... At the least, *judicial authorization* should be obtained prior to any nonexigent undercover activity....

....

We conclude that *warrantless* electronic participant monitoring conducted in a home offends the core values of [our constitution]. Accordingly, where the State uses an agent to enter a home for the purposes of eliciting and electronically transmitting evidence from an occupant of the home, it is the burden of the State to obtain *a warrant upon probable cause* prior to conducting that search.

221 W. Va. at 78-79, 81, 650 S.E.2d at 177-78, 180 (citations omitted, emphasis added).

*Judicially supervised* use of electronic surveillance by law enforcement officers is not forbidden by [our constitution]. [I]t is too easy to forget-and, hence, too often forgotten-that the issue here is whether to interpose *a search warrant procedure* between law enforcement agencies engaging in electronic eavesdropping and the public generally.... Interposition of a *warrant requirement* is designed not to shield "wrongdoers," but to secure a measure of privacy and a sense of personal security throughout our society.

221 W. Va. at 83, 650 S.E.2d at 182 (emphasis added).

. . . Legitimate interests of law enforcement authorities, however, may generally be met in the same manner as in other searches and seizures. In the absence of limited

exceptions, *a search warrant should be obtained from an impartial magistrate, based on probable cause to believe that criminal activity will be discovered*, before electronic monitoring of conversations should be allowed.

221 W. Va. at 85, 650 S.E.2d at 184 (emphasis added).

With respect to oral communications occurring within one's home, interception pursuant to [the statute] can only be deemed constitutional under Article 1, Section 8 if there has been a *prior determination of probable cause by a neutral, judicial authority*. The police failed to obtain judicial authorization to send the informant into Mr. Mullens' home while the informant was wearing an electronic surveillance device.

221 W. Va. at 85, 650 S.E.2d at 184 (citations omitted, emphasis added).

These numerous iterations of the test for a constitutionally sufficient finding of probable cause to permit a search, as set forth in *Mullens*, are consistent with this Court's established jurisprudence. For example, in *State ex rel. Hill v. Smith*, 172 W. Va. 413, 415-416, 305 S.E.2d 771, 773-774 (1983), this Court stated:

The United States Supreme Court has decided that the person issuing a warrant "must be *neutral and detached*, and he must be capable of determining whether probable cause exists for the requested arrest or search." While it is not necessary that the warrant issuer be a lawyer or a judge, the person may not be a law enforcement officer "engaged in the often competitive enterprise of ferreting out crime." [citations and footnote omitted, emphasis added].

And in Syllabus Point 1 of *State v. Slonaker*, 167 W. Va. 97, 280 S.E.2d 212 (1981), this Court stated:

"The constitutional guarantee under W. Va. Const., Article III, § 6 that no search warrant will issue except on probable cause goes to substance and not to form; therefore, where it is conclusively proved that a magistrate acted as a mere agent of the prosecutorial process and failed to make an *independent evaluation* of the circumstances surrounding a request for a warrant, the warrant will be held invalid and the search will be held illegal." *State v. Dudick*, 158 W. Va. 213 629, 213 S.E.2d 458 (1975), Syllabus Point 2 (emphasis added).

Nothing in West Virginia constitutional jurisprudence, including *State v. Mullens* , places a greater constitutional requirement than that of *an independent evaluation and finding of probable cause by a neutral, detached magistrate or judge*, as a threshold that must be passed to permit the issuance of a constitutionally valid order authorizing the in-home use of a body wire. West Virginia Code § 62-1F-2 (2007) passes muster under this test, when it authorizes any judge or magistrate in the county where the body wire is to be used to issue an order authorizing its use:

[law enforcement must] first obtain *from a magistrate or a judge of a circuit court* within the county wherein the nonconsenting party's home is located an order authorizing said interception. (Emphasis added).

To repeat: W. Va. Code § 62-1F-2 (2007), the statutory provision used in the instant case to determine probable cause to use a body wire in the Petitioners' homes, passes constitutional muster under the foregoing principles. Therefore, the Petitioners' argument that the Circuit Court of Mercer County unconstitutionally refused to suppress the evidence obtained by a body wire recording in the Petitioners' homes is without merit.

VI.

CONCLUSION

For the foregoing reasons, the consolidated Petitions for Appeal should be denied and the Petitioners' convictions, based upon their conditional pleas of guilty, should be affirmed.

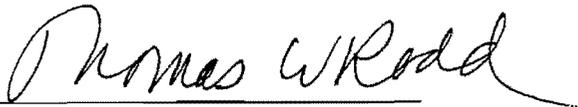
Respectfully submitted,

STATE OF WEST VIRGINIA,

*Respondent,*

By counsel,

DARRELL V. McGRAW, JR.  
ATTORNEY GENERAL



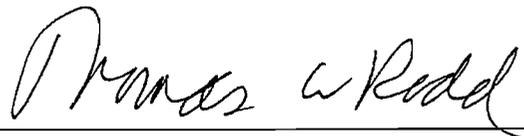
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THOMAS W. RODD  
ASSISTANT ATTORNEY GENERAL  
812 Quarrier Street, 6th Floor  
Charleston, West Virginia 25301  
State Bar No. 3143  
Telephone: (304) 558-5830  
E-mail: [twr@wvago.gov](mailto:twr@wvago.gov)  
*Counsel for Respondent*

**CERTIFICATE OF SERVICE**

I, Thomas W. Rodd, Assistant Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing "RESPONSE BRIEF OF THE STATE OF WEST VIRGINIA" was served upon the following by depositing the same, postage prepaid in the United States Mail, on this the 27th day of May, 2011, addressed as follows:

To: Henry L. Harvey  
Harvey & Janutolo Law Offices  
1605 Honaker Avenue  
Princeton, WV 24740



---

THOMAS W. RODD  
ASSISTANT ATTORNEY GENERAL  
812 Quarrier Street, 6th Floor  
Charleston, West Virginia 25301  
Telephone: (304) 558-5830  
State Bar No. 3143  
E-mail: [twr@wvago.gov](mailto:twr@wvago.gov)  
*Counsel for Respondent*