
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-0258

MATTHEW JACOB HUBLEY
Petitioner

V.)

STATE OF WEST VIRGINIA,
Respondent

Appeal from a final order
of the Circuit Court of Wood
County (09-F-167-R)

Petitioner's Brief

Counsel for Petitioner, Matthew Jacob Hubley

M. Paul Marteney (WV Bar No. 7194)
Counsel of Record
P.O. Box 157, St. Marys, WV 26170
(304) 684-9484 -- Fax 684-9499
p.marteney@gmail.com

TABLE OF CONTENTS

Table of Authorities	3
Assignments of Error	4
Statement of the Case	5
Summary of Argument	5
Statement regarding oral argument and decision	5
I. Unavailability of Witness	5
II. Confrontation Clause	6
III. Inadmissible Hearsay	8
IV. State Withheld Evidence	11
V. Failure to grant new trial	14
VI. Unfair Comment	17

TABLE OF AUTHORITIES

West Virginia Cases

1. *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975) 7
2. *Syl. Pt. 5, State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990) 9
3. *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982) 13, 16
4. *State v. Mason*, 194 W.Va. 221, 460 S.E.2d 36 (1995) 6
5. *State v. Mechling*, 219 W.Va. 366, 633 S.E.2d 311 (2006) 6
6. *State v. Kevin B. Payne*, Appeal No. 34889, filed May 6, 2010 9
7. *In re State Public Building Asbestos Litigation*, 193 W. Va. 119, 454 S.E.2d 413 (1994) 14
8. *State v. Pettrey*, 209 W.Va. 449, 549 S.E.2d 323 (2001) 9
9. *State v. Youngblood*, 221 W.Va. 20, 650 S.E.2d. 119 (2007) 13

Federal Cases

10. *Barbee v. Warden, Md. Penitentiary*, 331 F.2d 843 (4th Cir. 1964) 14, 16
11. *Brady v. Maryland*, 373 U.S. 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) 13, 14, 15
12. *Bullecoming v. New Mexico*, U. S. Sup. Ct. No. 09-10876 (2011) 7
13. *Crawford v. Washington*, 541 U.S. 36 (2004) 6
14. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) 7
15. *Ohio v. Roberts*, 448 U. S. 56 (1980) 6, 10, 11
16. *Idaho v. Wright*, 497 U.S. 805 (1990) 10, 11
17. *Ring v. Erickson*, 983 F.2d 818 (8th Cir. 1992) 11

Statutory Authority

18. *West Virginia Constitution*, Article III, Section 14 7
19. *United States Constitution*, Amendment VI 7
20. W. Va. R. Ev. 803(4) 5, 9

Other

21. Convictions through Hearsay in Child Sexual Abuse Cases: A Logical Progression Back to Square One; 72 Marq. L. Rev. 47 (1988-1989); Tuerkheimer, Frank M. 8

ASSIGNMENTS OF ERROR

- I. THE CIRCUIT COURT ERRED IN DETERMINING THAT THE CHILD VICTIM WAS "UNAVAILABLE" TO TESTIFY IN THE TRIAL EVEN THOUGH SHE WAS PHYSICALLY PRESENT AND ABLE TO TESTIFY
- II. THE CIRCUIT COURT DENIED PETITIONER DUE PROCESS BY DENYING PETITIONER HIS RIGHT TO CONFRONT HIS ACCUSER
- III. THE CIRCUIT COURT ERRED IN FINDING THAT THE FORENSIC MEDICAL EXAMINATION OF THE VICTIM WAS PERMISSIBLE HEARSAY
- IV. THE CIRCUIT COURT ERRED IN FINDING THE STATE DID NOT WITHHOLD EXCULPATORY EVIDENCE IN THE DISCOVERY PHASE OF THE CASE
- V. THE CIRCUIT COURT ABUSED ITS DISCRETION IN FAILING TO GRANT PETITIONER'S MOTION FOR A NEW TRIAL
- VI. THE STATE'S EVIDENCE THAT PETITIONER HAD BEEN MIRANDIZED BY THE POLICE OFFICER WAS UNFAIRLY PREJUDICIAL.

STATEMENT OF THE CASE

Matthew Jacob Hubley, Petitioner, was charged on September 18, 2009, by an eight-count indictment [Appendix p. 3] of various counts of sexual abuse and sexual assault. Petitioner was represented at the trial level by counsel, Eric W. Powell. On October 7, 2009, a defense motion to sever the counts was granted with counts 1 through 3 being severed from counts 4 through 8. On October 22, 2010, Petitioner was convicted, following a two-day jury trial, of one count of Sexual Abuse in the First Degree (W. VA. CODE § 61-8B-7), being Count 1 of the Indictment. [Appendix p. 287] Subsequently, Petitioner's trial counsel filed a Motion for a new trial, which was denied. It is from the original conviction and the Order denying a new trial from which

Peititioner appeals.

SUMMARY OF ARGUMENT

Petitioner Matthew Hubley's trial on three counts of an eight-count indictment was plagued by error and prejudicial misconduct by the prosecution. The greatest errors made by the court involve an interplay of a hearsay exception contained in W.Va. R. Evid 803(4) and the Constitutional right of an accused to face his accuser and cross examine his accuser. The Court improperly admitted hearsay under the rule's exception, and improperly denied the Petitioner the right to confront his accuser by declaring her unavailable even though she was physically present and able to testify.

In addition, the State, willingly or not, withheld potentially exculpatory evidence, despite an explicit request by Peititioner's counsel, and only revealed it at the trial. The State did not investigate the evidence, and the court improperly denied the Peititioner's right to a new trial after this "new" evidence was brought to the attention of Petitioner.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner requests the opportunity to argue this case before the court.

ARGUMENT

- I. THE CIRCUIT COURT ERRED IN DETERMINING THAT THE CHILD VICTIM WAS "UNAVAILABLE" TO TESTIFY IN THE TRIAL EVEN THOUGH SHE WAS PHYSICALLY PRESENT AND ABLE TO TESTIFY

The Victim, R.S., was a minor child who was eight years of age at the time of the trial. On direct examination at the trial, she refused to testify about any improper touching. [Appendix p. 107] She failed to identify Petitioner, and was unable to name anyone who may have touched her improperly. The court determined that cross

examination would not be beneficial, and ruled that she was “unavailable” This ruling opened the door for otherwise inadmissible hearsay testimony about the facts that the “unavailable” witness was unable to confirm on direct examination. [Appendix p. 247+]

This court has previously held, in Syllabus Point 6 of *State v. Mechling*, 219 W.Va. 366, 633 S.E.2d 311 (2006), that:

Pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004), the Confrontation Clause contained within the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution bars the admission of a testimonial statement by a witness who does not appear at trial, unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness.

“An essential purpose of the Confrontation Clause is to ensure an opportunity for cross-examination. In exercising this right, an accused may cross-examine a witness to reveal possible biases, prejudices, or motives.” *Syl. Pt. 1, State v. Mason*, 194 W.Va. 221, 460 S.E.2d 36 (1995). It is accepted that “the Confrontation Clause ‘operates in two separate ways to restrict the range of admissible hearsay.’” *Ohio v. Roberts*, 448 U. S. 56 (1980). “First, in conformance with the Framers’ preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case . . . , the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.” *Ibid.* In this case, the prosecution not only had the witness available, it called her in its case in chief, then had her declared unavailable because she would not give the answer the State wanted. The court should not have rule her unavailable on that basis.

II. THE CIRCUIT COURT DENIED PETITIONER DUE PROCESS BY DENYING PETITIONER HIS RIGHT TO CONFRONT HIS ACCUSER

Fundamental to the due process of law is the right of an accused to confront his accuser. The Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution embody this concept, and expressly guarantee the right for persons accused of a crime in this State. Denial of the right is a denial of due process and is reversible error. "Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." *Syllabus Point 5, State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975). In this case, Petitioner was denied this right by the Circuit Court's ruling that the victim of the alleged crimes was "unavailable," even though she was physically present at the trial and able to testify about some facts on direct examination.

The testimony of the victim was introduced as a product of a forensic medical examination, through the testimony of the examiner. The United States Supreme Court has recognized, in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), that forensic reports are "testimonial statements" inasmuch as analysts who create such reports are "witnesses" for purposes of the Sixth Amendment. *Id.* at 2532. Petitioner was unable to confront and cross examine his accuser - the victim - in open court.

As was argued - successfully - in the Supreme Court's recent expansion of the Crawford line of cases, "Confrontation of a particular witness serves four primary purposes: (1) it enables cross-examination concerning the witness's factual assertions, his believability, and his character; (2) it guarantees that the witness gives his testimony under oath; (3) it allows the trier of fact to observe the witness's demeanor; and (4) it ensures that the witness testifies in the presence of the defendant." Petitioner's Brief, *Bullcoming v. New Mexico*, U. S. Sup. Ct. No. 09-10876 (2011). The court in

Bullcoming stated, “[T]he [Confrontation] Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another’s testimonial statements provides a fair enough opportunity for cross-examination.

In this case, State was unable to get the testimony of R.S. directly, even though it had her at the trial and on the stand. The court found she was unavailable through her reluctance to accuse or identify the Petitioner directly. Her testimony was put on through an outside party who gathered the information solely for the purpose of the prosecution. The Court found the evidence to be inherently credible and thus admissible. However, as one scholar commented on such evidentiary dilemmas:

We have, therefore, traveled a complete circle. We began by excluding hearsay because it prevented the accused from confronting his accuser. We developed exceptions because, as a general matter, the evidence which was the subject of the exception seemed reliable. We then apply those exceptions with unassailable logic and culminate with convictions where the right to confront is reduced to a general attack on presumably dispassionate psychological testimony. Ultimately, the accuser does not testify and is immune from cross-examination. . . . While a logical application of the hearsay rule exceptions can easily result in admissible evidence pointing unmistakably to the defendant's guilt, exclusive reliance on such evidence puts the defendant in the position where he has no meaningful witness to cross-examine.

Convictions through Hearsay in Child Sexual Abuse Cases: A Logical Progression Back to

Square One; 72 Marq. L. Rev. 47 (1988-1989); Tuerkheimer, Frank M.

Petitioner was unable to cross-examine his accuser, and the admitted hearsay was the only direct evidence of his guilt. It’s improper admission was both a misapplication of the rule on the hearsay exceptions, it was also a violation of the Petitioner’s constitutional right to confront his accuser.

III. THE CIRCUIT COURT ERRED IN FINDING THAT THE FORENSIC MEDICAL

EXAMINATION OF THE VICTIM WAS PERMISSIBLE HEARSAY

The court erred by abusing its discretion to admitting hearsay evidence under the medical examination exception, W.Va. R. Evid 803(4), despite the factors for admission of hearsay under that exception having not been met, and despite the declarant's availability to testify. [See Appendix p. 24] Further, the court abused its discretion because the examination was for forensic purposes and not for treatment. [Appendix p. 165] “The two-part test set for admitting hearsay statements pursuant to W. Va. R. Evid. 803(4) is (1) the declarant's motive in making the statements must be consistent with the purposes of promoting treatment, and (2) the content of the statement must be such as is reasonably relied upon by a physician in treatment or diagnosis.’ *Syl. Pt. 5, State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990).” *State v. Kevin B. Payne*, Appeal No. 34889, filed May 6, 2010.

R.S.'s mother took her sought a medical opinion solely for the purpose of a forensic determination, not for treatment. In fact, there was nothing to treat: the incidents alleged had happened in the remote past, and no physical or psychological injury was alleged. R.S. herself was not told her statements were going to be used for medical treatment purposes. Nevertheless, the trial court ruled that the statements R.S. made during the examination were admissible. This court has expressed a contrary opinion about analogous testimony in a similar case: “The testimony is inadmissible if the evidence was gathered strictly for investigative or forensic purposes.” *State v. Pettrey*, 209 W.Va. 449, 549 S.E.2d 323 (2001). The *Pettrey* court would admit such statement if the examination had a dual purpose – treatment and investigative – but there was no evidence that such dual purpose was the intent of the examination of R.S. The trial court abused its discretion by ignoring the precedent of this court, and allowing the hearsay testimony, to the undeniable prejudice of the rights of the Petitioner.

The trial court's analysis of the purpose of the Rule was also faulty. The hearsay exception propounded by Rule 803(4) is: "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." The Trial Court here applied the rule's exception to the statements made by R.S. under the simplistic analysis that the indicia of reliability necessary for that exception is met simply by there being "something there, somebody has to at least say something to the child or give to the child an impression that she is being examined for some kind of medical purpose."

The exception is not that simple. West Virginia's Rule mirrors the federal Rule, and most states have adopted identical language, which the United States Supreme Court has thoroughly dissected, untangling and explaining the reasoning behind the exception under the rule and in terms of the Confrontation Clause, an issue argued elsewhere in this brief:

In *Ohio v. Roberts*, we set forth "a general approach" for determining when incriminating statements admissible under an exception to the hearsay rule also meet the requirements of the Confrontation Clause. 448 U. S., at 65. We noted that the Confrontation Clause "operates in two separate ways to restrict the range of admissible hearsay." *Ibid.* "First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case . . . , the prosecution must either produce, or demonstrate the unavailability of, the declaring whose statement it wishes to use against the defendant." *Ibid.* (citations omitted). Second, once a witness is shown to be unavailable, "his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Id.*, at 66 (footnote omitted); see also *Mancusi v. Stubbs*, 408 U. S. 204, 213 (1972).\

Idaho v. Wright 497 U.S. 805 (1990).

The trial court, in this case, did not sufficiently evaluate the adequacy of the indicia of

reliability of R.S.'s statements, but simply deemed them reliable because they were made to a person who looked like a person providing treatment, in a hospital setting – circular logic at best. It is not enough that a statement is made that could possibly be used for treatment purposes, it must be made for that purpose, and the declaring must know it is for that purpose and must intend to benefit therapeutically from the hearer's use of the statement. In *Ohio v. Roberts*, 448 U. S. 56 (1980), the Court interpreted the Clause to mean that hearsay may be admitted only under a "firmly rooted" exception, or if it otherwise bears "particularized guarantees of trustworthiness." A statement that qualifies for admission under a "firmly rooted" hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability. *Idaho v. Wright* 497 U.S. 805 (1990) at 820-821. Given the circumstances of the testimony the State sought to admit in this case,¹ the hearsay statements themselves, and the actual availability of the witness that takes the testimony out of the scope of the Rule, adversarial testing was not only essential, it could have entirely obviated the credibility of the statements and likely imposed strong doubt as to their accuracy. Absent an unavailable witness, the Rule did not apply, and if the rule does not apply, the guarantee of reliability of the statement must be substantial and particular.

IV. THE CIRCUIT COURT ERRED IN FINDING THE STATE DID NOT WITHHOLD EXCULPATORY EVIDENCE IN THE DISCOVERY PHASE OF THE

¹ “[A] statement made in the course of procuring medical services where the declaring knows that a false statement may cause misdiagnosis or mistreatment, carries special guarantees of credibility . . . ,” *White v. Illinois*, 502 U.S. 346, 356, 112 S.Ct. 736, 742, 116 L.Ed.2d 848, 859 (1992). There was no evidence of such knowledge by R.S. admitted at the trial. Where there is no showing that a declaring was aware that their statement was made for purposes of medical treatment and diagnosis, this exception is not applicable. *See Ring v. Erickson*, 983 F.2d 818 (8th Cir. 1992).

CASE

The victim of the crimes alleged against Petitioner identified a person named "Tony," later more fully identified as a "Tony Lewis," as a possible perpetrator. During investigation of this matter, Counsel for the Defendant propounded a discovery request upon the State of West Virginia, in preparation of defending Mr. Hubley against the allegations as set forth in Counts 1 through 3 of the Indictment. A Grand Jury transcript was provided defense counsel wherein it expressly stated that trooper Kocher conducted an investigation to which he testified there was no Tony Lewis. The State further expressly represented from the discovery response on June 10, 2010, there was no "exculpatory" evidence pertaining to Defendant. Sometime in October, 2010, within ten (10) days before the start of trial, Assistant Wood County Prosecuting Attorney Russell Skogstad telephonically advised defense counsel that "there is no Tony" (present tense).

At the trial, during the presentation of the State's case in chief, the victim's mother testified that a person named Tony Lewis had stayed in their home. It was during Defendants' trial that defense counsel first learned that a "Tony" existed and that he had a last name to go on. Defense counsel was surprised and unprepared to conduct a cross-examination since defense counsel had no reasonable opportunity to learn of "Tony's" true identity for the purpose of both trial preparation and criminal investigation.

This information should have been disclosed to defense counsel from the State at the very beginning as the child victim specifically identified this man by the name of Tony while the State represented Tony did not exist. This failure by the state is grounds for a new trial. A new trial may be awarded on the ground that the prosecution did not disclose, or otherwise suppress, exculpatory evidence. *See Lawyer Disciplinary Board*

v. Hatcher, 199 W. Va. 227, 483 S. E. 2d 810 (1997) (wherein a prosecutor who withholds exculpatory evidence not only risks reversible error but also ethics charges.) The court went on to opine that it is without question that it is a constitutional violation of a defendant's right to a fair trial for a prosecutor to withhold or suppress exculpatory evidence. As argued above, violation of a constitutional right is reversible error.

Whether or not the prosecutor knew of the existence of Tony Lewis is irrelevant; he should have known, and his law enforcement officer/investigator did know. "A police investigator's knowledge of evidence in a criminal case is imputed to the prosecutor. Therefore, a prosecutor's disclosure duty under *Brady v. Maryland* 373 U.S. 83, 8:3 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and *State v. Hatfield*, 169 W.Va., 191, 286 S.E.2d 402 (1982) includes disclosure of evidence that is known only to a police investigator and not to the prosecutor." *State v. Youngblood*, 221 W.Va. 20, 650 S.E.2d. 119 (2007).

It should not be incumbent upon defense counsel to undertake additional investigation to determine the truthfulness and veracity of information provided from the State to defense counsel. The State has the mandatory obligation to investigate evidence they knew existed, or should have known existed, with disclosure of any known exculpatory evidence to be made known to defense counsel in a timely manner. Through poor, or no police investigation, defense counsel was placed at a great disadvantage without knowing of material information wholly exculpatory to the defendant. Defense counsel was thwarted from presenting all the necessary and material evidence to the jury for their deliberation and consideration as the State benefitted themselves and prejudiced the defendant by failing to disclose to defense counsel the true identity of the accused perpetrator until the State's witness testified

during trial.

That Defendant was denied the protections of his Fifth and Fourteenth Amendment to the United States Constitution to due process by being denied such materially exculpatory evidence prior to trial.

As held in *Brady v. Maryland*, 373 U.S. 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), "Suppression by the Prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt, or to punishment, irrespective of the good faith or bad faith of the prosecution". In this case, that evidence was the fact that the accused perpetrator by name, Tony Lewis, resided with R.S. sometime prior to defendant staying 2 days in January 2009. The State's investigator knew of this person. The Court in *Barbee v. Warden, Md. Penitentiary*, 331 F.2d 843 (4th Cir. 1964) imputed the knowledge of the police to the Prosecutor under the theory that the Prosecutor and the police were State officials under the Fourteenth Amendment. In addition, the *Barbee* Court interpreted *Brady* to mean that a motion by the defense attorney was not required when the exclusion of exculpatory evidence violated the rules of fundamental fairness and denied due process.

V. THE CIRCUIT COURT ABUSED ITS DISCRETION IN FAILING TO GRANT PETITIONER'S MOTION FOR A NEW TRIAL

Following the trial, Petitioner's trial counsel filed his Motion for New Trial, based on the foregoing errors and the deprivation of Petitioner's constitutional rights. A hearing was held on the Motion and an Order denying the Motion was entered subsequent to the filing of this appeal. The Circuit court abused its discretion in denying the Motion, as a new trial was plainly warranted by the errors. A trial judge's decision to

award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion." *Syl. pt. 3, In re State Public Building Asbestos Litigation*, 193 W. Va. 119, 454 S.E.2d 413 (1994), cert. denied, *W. R. Grace & Co. v. West Virginia*, 515 U.S. 1160, 115 S. Ct. 2614, 132 L. Ed. 2d 857 (1995).

Petitioner's Motion was based on essentially the same grounds as asserted here. However, the trial judge had a first-hand view of the case, and abused his discretion by ignoring the effect the trial errors had on the verdict, and most especially, in finding the State did not prejudice Petitioner's defense by withholding its information about the existence of "Tony." The court, invading the province of the jury, ruled that even if Tony had been located prior to trial, his existence and prior presence in the home of the victim was not exculpatory.

This information was paramount, if not critical as to the issue of raising reasonable doubt in that how many persons named "Tony" was in this girl's life only to learn during trial there was such a person and know nothing about him other that he lived in the residence and had an opportunity to commit the type of crime Mr. Hubley was alleged to have committed. The State's failure, intentional or otherwise, to disclose this critical information is well outside the interests of justice manifesting the need for a new trial, which, by further effect, sends a clear and resounding message that failure to disclose exculpatory evidence to defense counsel before trial, essentially resulting in trial by surprise, will not be tolerated in this court.

"Suppression by the Prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt [here, accused perpetrator by name, Tony Lewis, resided with R.S. sometime prior to defendant staying

2 days in January 2009], or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady v. Maryland, supra*. The Court in *Barbee, supra*, imputed the knowledge of the police to the Prosecutor under the theory that the Prosecutor and the police were State officials under the Fourteenth Amendment. In addition, the Barbee Court interpreted Brady to mean that a motion by the defense attorney was not required when the exclusion of exculpatory evidence violated the rules of fundamental fairness and denied due process.

It should not be incumbent upon defense counsel to undertake additional investigation to determine the truthfulness and veracity of information provided from the State to defense counsel. The State has the mandatory obligation to investigate evidence they knew existed, or should have known existed, with disclosure of any known exculpatory evidence to be made known to defense counsel in a timely manner. Through poor, or no police investigation, defense counsel was placed at a great disadvantage without knowing of material information wholly exculpatory to the defendant. Defense counsel was thwarted from presenting all the necessary and material evidence to the jury for their deliberation and consideration as the State benefitted themselves and prejudiced the defendant by failing to disclose to defense counsel the true identity of the accused perpetrator until the States witness testified during trial.

“A prosecution that withholds evidence which if made available would tend to exculpate an accused by creating a reasonable doubt as to his guilt violates due process of law under Article III, Section 14 of the West Virginia Constitution.” *Syl. pt. 4, State v. Hatfield, supra*.

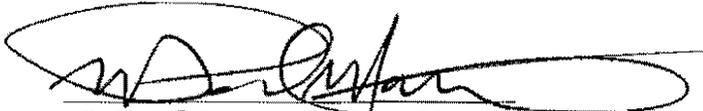
VI. THE STATE'S EVIDENCE THAT PETITIONER HAD BEEN MIRANDIZED BY THE POLICE OFFICER WAS UNFAIRLY PREJUDICIAL.

The State committed prejudice to the Defendant by presenting West Virginia State Trooper Jason Kocher to testify before the jury that he had "Mirandized" Mr. Hubley while investigating the allegation. [Appendix p. 247] Even though defense counsel did not object to this remark out of concern that to do so would bring undue attention to the fact that may be Mr. Hubley had been arrested and taken into custody, the admonishment by the Court against the Prosecutor (even though outside the presence of the jury), still may have contributed to an undue prejudice affecting the juries ability, as a fact finding body, to remain fair and impartial while deliberating the guilt or innocence of Mr. Hubley.

CONCLUSION

The Defendant's conviction should be reversed, or a new trial should be ordered.

Respectfully submitted,



M. Paul Marteney, W. Va. Bar No. 7194
Counsel for Petitioner
P.O. Box 157, St. Marys, WV 26170
(304) 684-9484
p.marteney@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of July, 2011, true and accurate copies of the foregoing **Petitioner's Brief** were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

Russell Skogstad, Jr.
Assistant Prosecuting Attorney
317 Market Street
Parkersburg, WV 26101

Signed: 

M. Paul Marteney, No. 7194
Counsel of Record for Petitioner