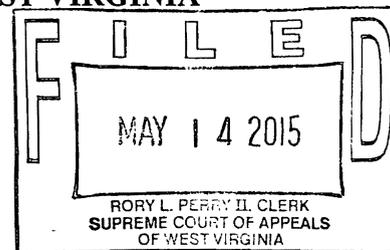


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-1101



STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

vs.

JOSHUA NEAL HUBBARD,

Defendant Below, Petitioner.

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

COMES NOW, Respondent, State of West Virginia, by counsel, David A. Stackpole, Assistant Attorney General and responds to Petitioner's Brief. Petitioner was found guilty, following a jury trial, of Murder in the First Degree and of Conspiracy to Commit a Felony: Murder and sentenced to life without the possibility of parole. This Court should affirm Petitioner's conviction and sentence.

I.

STATEMENT OF THE CASE

Amber Lee Richardson (hereinafter "Ms. Richardson") was a friend of Petitioner's from high school. (App. 7 at 542.) Ms. Richardson was married and had three (3) children. (App. 7 at 549.) Ms. Richardson was unhappy with her marriage and she fought with her husband often. (App. 7 at 552, 557.) Petitioner and Ms. Richardson devised a plan for Petitioner to kill Ms. Richardson's husband. (App. 7 at 571.) Petitioner staked out the house and waited for Ms.

Richardson's husband to come outside. (App. 7 at 571-74.) When he came out of the house, Petitioner was "laying on the ground beside the chicken coop" about ten (10) to fifteen (15) yards away. (App. 7 at 574-75.) Petitioner stepped out from his hiding place and "hollered his name." (App. 8 at 590.) Petitioner and Ms. Richardson's husband "argued a little bit." (App. 8 at 593.) Petitioner alleged that he was going to walk away and that Ms. Richardson's husband came at him with a knife. (App. 8 at 598-99.) Petitioner admits that he drew his gun and started firing. (App. 8 at 601.) Then Petitioner used the gun like a club and hit Ms. Richardson's husband in the head multiple times before shooting Petitioner again. (App. 8 at 601-02; App. 6 at 240.) Petitioner took everything from the victim's pockets and gave it to Ms. Richardson. (App. 8 at 608.) Petitioner hid the body behind the chicken coop. (App. 8 at 606.) Later, Petitioner moved the body. (App. 8 at 609.) Petitioner also bleached the gun. (App. 8 at 609.) When the police arrived, Petitioner fled into the woods. (App. 8 at 612.) He went and hid in a camper. (App. 9 at 613.)

Sergeant Charles Kevin McKenzie (hereinafter "Sergeant McKenzie") works for the West Virginia State Police and was the lead investigator in the matter. (App. 2 at 9-10.) On June 3, 2013, Sergeant McKenzie spoke with Ms. Richardson, the victim's wife, and was informed that she and Petitioner had a plan to kill her husband. (App. 2 at 10.) Ms. Richardson was arrested. *Id.*

The police pursued Petitioner, but lost him in the woods. (App. 2 at 11.) The search continued through the night and into the next day. *Id.* On June 4, 2013, Sergeant McKenzie obtained a warrant for Petitioner's arrest "first thing that morning." (App. 2 at 11-2.) That afternoon, Petitioner was apprehended at a camper in Greenbrier County. (App. 2 at 11.) Sergeant McKenzie was not present at the time of the arrest, but arrived at the time that

Petitioner was brought out of the camper. (App. 2 at 12.) Sergeant Barlow brought Petitioner to Sergeant McKenzie. (App. 2 at 11.) At approximately 4:49 p.m., Sergeant McKenzie and Corporal Richards transported Petitioner to the Lewisburg detachment of the West Virginia State Police. (App. 2 at 12-3, 32, 39.) Petitioner was not interrogated during the transport. *Id.* However, while being transported, Petitioner informed Sergeant McKenzie that he wished to make a statement. (App. 2 at 43, 59.)

They arrived at the detachment at approximately 5:10 p.m. (App. 2 at 32, 39.) When they arrived at the detachment, Petitioner was exhausted, hot, hungry, and thirsty. *Id.* Petitioner was given refreshment and allowed to cool down. (App. 2 at 19.) Petitioner “was advised that he was under arrest for first degree murder.” (App. 2 at 15, 39.)

Corporal Jerry W. Davis, Jr. (hereinafter “Corporal Davis”) arrived at the detachment shortly after 5:10 p.m. (App. 2 at 60.) When Corporal Davis spoke to Petitioner, Petitioner told him what he had told Sergeant McKenzie, that he wished to make a statement. (App. 2 at 59-60.) The police already had a statement from Ms. Richardson, which was only one (1) side of the story and Petitioner had requested to tell his side of the story. (App. 2 at 59.)

As part of the *Miranda* warning process, Sergeant McKenzie used a DPS Form 79, Interview and *Miranda* Rights Form. (App. 2 at 14.) The form was filled out at 5:26 p.m. and witnessed by Corporal Davis. (App. 2 at 14, 47-8.) Petitioner signed and dated the statement at 5:35 p.m. (App. 2 at 16, 39.) It took nine (9) minutes for Sergeant McKenzie to go over the form with Petitioner. *Id.* Petitioner appeared to understand his rights. (App. 2 at 21, 35.)

Sergeant McKenzie and Corporal Davis spoke to Petitioner “for approximately an hour and a half, two hours; as much as our discretion as his request, to discuss the matter; get his side of the story that he wanted to provide us.” (App. 2 at 19.) That conversation was not recorded

and Petitioner was informed that it would not be recorded. (App. 2 at 50-1.) Petitioner told Corporal Davis that “he felt more comfortable talking” without being recorded. (App. 2 at 51, 63-4.)

Then, at around 7:23 p.m., Petitioner gave a recorded statement. (App. 2 at 39.) At that point, Petitioner “felt comfortable talking and giving a taped conversation. (App. 2 at 51.) The reason for the discussion prior to the recorded statement was to allow both sides to be able to ask questions and to provide for a “smooth” recorded statement, free from interruptions. (App. 2 at 20, 50.) There was no coercion or inducements made to Petitioner for his cooperation. (App. 2 at 16-8, 49-50.) Petitioner was cooperative. (App. 2 at 21.) The statement ended at approximately 9:47 p.m. (App. 2 at 33, 39.) Following the recorded statement, Petitioner was fingerprinted and then “transported directly to the Magistrate Court.” (App. 2 at 42.)

Ms. Richardson’s husband died with “significant injuries” of his head, including “both firearm injuries or gunshot wound of the head, as well as very significant blunt force injuries.” (App. 6 at 240.) The victim had “multiple fractures involving the skull, the cranium, and then the injuries involving the brain, largely due to the track of the bullet, but also likely superimposed brain injuries from the blunt force trauma.” *Id.* Additionally, the victim had “injuries on the body,” including a gunshot wound on the left arm and “scrapes and bruises on different parts of the body.” *Id.*

On January 14, 2014, Ms. Richardson and Petitioner were indicted on one (1) count of Murder, one (1) count of Accessory to Murder, and one (1) count of Conspiracy to Commit a Felony Offense: Murder. (App. 1 at 4-5.)

On June 2, 2014, Petitioner filed a Motion to Suppress Statement of the Defendant. (App. 1 at 8.) Petitioner’s Motion provided no analysis other than the bare bones claim that

“such statements were obtained or otherwise taken in violation of the Defendant’s constitutional rights.” *Id.* On July 10, 2014, the Trial Court held a Suppression Hearing regarding the admissibility of Petitioner’s statement. (App. 2 at 1-70.) The Trial Court concluded that based on the testimony at the Suppression Hearing, Petitioner’s “statement was given voluntarily after he had been advised of his constitutional rights and had waiver (sic) of his rights.” (App. 1 at 9-10.)

On August 12, 2014, the Trial Court held a Pretrial Motions Hearing. (App. 3 at 1-24.) Following the Pretrial Motions Hearing, the Trial Court issued an Order that expressly denied Petitioner’s Motion to Suppress finding that Petitioner told the officers that “he wanted to tell his side of the story.” (App. 1 at 11-5.) The Trial Court viewed “the totality of the circumstances surrounding” Petitioner’s statement and concluded that Petitioner’s request to make a statement “was made voluntarily and was not the product of any interrogation by the police.” *Id.*

On September 17, 2014, Petitioner filed a Motion to Reconsider. (App. 1 at 16-22.) In the Motion to Reconsider, Petitioner asserted a violation of the Prompt Presentment rule. *Id.* On September 10, 2014, the Trial Court held another Pretrial Motions Hearing. (App. 4 at 1-35.) At that Hearing, the parties argued the Motion to Reconsider. (App. 4 at 16-33.) On September 18, 2014, the Trial Court denied Petitioner’s Motion to Reconsider. (App. 1 at 23-28.) The Trial Court expressly found that there was no conflict between Sergeant McKenzie’s testimony that there was no discussion of the crime during the transport to the detachment and Sergeant McKenzie’s testimony that Petitioner requested to make a statement during the transport to the detachment. (App. 1 at 26-7.) The Trial Court also found that Petitioner’s claim that Corporal Davis and Sergeant McKenzie provided conflicting testimony to be without merit because “the

discrepancy between the officers can be easily explained.” (App. 1 at 27.) The Trial Court found that “Corporal Davis heard on the radio that [Petitioner] was in custody” and then “called Sergeant McKenzie” and “offered his help.” *Id.*

A jury trial was held from September 23-26, 2014. (App. 1 at 1.) Petitioner was found guilty of Murder in the First Degree without a recommendation of mercy and guilty of Conspiracy to Commit a Felony Offense: Murder. (App. 1 at 1-2.) Petitioner was sentenced to life without the possibility of parole for the Murder in the First Degree count and to a term of one (1) to five (5) years for the Conspiracy count, with concurrent sentencing. (App. 1 at 2-3.)

II.

SUMMARY OF THE ARGUMENT

There was no violation of the Prompt Presentment rule. Petitioner mischaracterizes the testimony of the officers. Petitioner was arrested and within a few minutes was turned over to Sergeant McKenzie. The police had the right to take him to the detachment for processing prior to presentment at the Magistrate. On the way to the detachment, Petitioner stated his desire to make a statement and offer his side of the story. It was not clear at the time that he requested to make the statement as to whether his statement would be incriminating. The Prompt Presentment rule allows for a suspect who wishes to make a statement to have the right to make the statement prior to presentment to the Magistrate. Petitioner was given something to eat and drink. Petitioner was informed of his *Miranda* rights and he waived his rights. The police obtained an unrecorded oral statement, asking questions and allowing Petitioner to ask questions. Then, instead of reducing the statement to writing, the police obtained a recorded statement. Immediately following the statement, Petitioner was fingerprinted. The Prompt Presentment rule

allows for booking procedures. Following fingerprinting, Petitioner was taken directly to the Magistrate. The entire time at the detachment was less than five (5) hours.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

All the issues raised by Petitioner have been authoritatively decided. The facts and legal arguments are adequately presented in the Briefs and the Appendix. The decisional process would not be aided by Oral Argument. This matter is appropriate for a Memorandum Decision.

IV.

ARGUMENT

Petitioner only raises one (1) assignment of error: claiming that the Trial Court's denial of his Motion to Suppress Petitioner's Statement and that the Trial Court's subsequent admission of Petitioner's statement at trial was error. Pet'r's Br. at 4. Petitioner's claim confuses the facts and ignores the law.

A. Standard of Review.

“[A] circuit court's denial of a motion to suppress evidence will be affirmed unless it is unsupported by substantial evidence, based on an erroneous interpretation of law, or, based on the entire record, it is clear that a mistake has been made.” Syl. Pt. 3, *State v. Rogers*, 231 W. Va. 205, 744 S.E.2d 315, 317 (2013) (quoting Syl. Pt. 2, in part, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996)).

“On appeal, legal conclusions made with regard to suppression determinations are reviewed *de novo*.” Syl. Pt. 1, *Rogers*, 231 W. Va. at 205, 744 S.E.2d at 317 (quoting Syl. Pt. 3, *State v. Stuart*, 192 W. Va. 428, 452 S.E.2d 886 (1994)). “Factual determinations upon which these legal conclusions are based are reviewed under the clearly erroneous standard.” *Id.* “In

addition, factual findings based, at least in part, on determinations of witness credibility are accorded great deference.” *Id.*

“When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below.” Syl. Pt. 2, *Rogers*, 231 W. Va. at 205, 744 S.E.2d at 317 (quoting Syl. Pt. 1, *Lacy*, 196 W. Va. at 104, 468 S.E.2d at 719). “Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues.” *Id.* “Therefore, the circuit court’s factual findings are reviewed for clear error.” *Id.*

B. There Was No Violation Of The Prompt Presentment Rule Because Petitioner Requested To Make A Statement.

The Trial Court properly admitted Petitioner’s statement at trial and denied Petitioner’s Motion to Suppress as there was no violation of the Prompt Presentment rule. If a person has been arrested, then the Prompt Presentment rule requires that he or she be taken “without unnecessary delay before a magistrate.” W. Va. R. Crim. P. 5; W. Va. Code § 62-1-5(a)(1) (1997); *see also*, Syl. Pt. 2, *State v. Humphrey*, 177 W. Va. 264, 265, 351 S.E.2d 613, 614 (1986). “An unreasonable and unjustified delay in taking an accused before a magistrate after his initial arrest may, in itself, render a confession inadmissible at trial.” *State v. Dyer*, 177 W. Va. 567, 571-72, 355 S.E.2d 356, 360-61 (1987) (citing *State v. Persinger*, 169 W. Va. 121, 286 S.E.2d 261 (1982)). “When a statement is obtained from an accused in violation of the prompt presentment rule, neither the statement nor matters learned directly from the statement may be introduced against the accused at trial.” Syl. Pt. 1, *State v. DeWeese*, 213 W. Va. 339, 341, 582 S.E.2d 786, 788 (2003). “However, the failure to strictly comply with the requirements of W. Va. Code § 62–1–5 does not necessarily vitiate every confession; rather, the delay is treated as

one factor in evaluating the voluntariness of the confession under traditional principles of due process.” *Dyer*, 177 W. Va. at 571-72, 355 S.E.2d at 360-61 (1987) (citing *State v. Mason*, 162 W. Va. 297, 249 S.E.2d 793 (1978)).

“The delay in taking a defendant to a magistrate may be a critical factor [in the totality of circumstances making a confession involuntary and hence inadmissible] where it appears that the primary purpose of the delay was to obtain a confession from the defendant.” Syl. Pt. 5, *Rogers*, 231 W. Va. at 205, 744 S.E.2d at 317 (citations omitted.) Nonetheless, not all delays violate the Prompt Presentment rule:

We have also recognized, however, that “[c]ertain delays such as delays in the transportation of a defendant to the police station, completion of booking and administrative procedures, recordation and transcription of a statement, and the transportation of a defendant to the magistrate do not offend the prompt presentment requirement.” *State v. Sugg*, 193 W. Va. 388, 395–96, 456 S.E.2d 469, 476–77 (1995) (citing *State v. Ellsworth J.R.*, 175 W. Va. 64, 70, 331 S.E.2d 503, 508 (1985)) (footnote omitted).

Rogers, 231 W. Va. at 210-11, 744 S.E.2d at 320-21. Additionally, this Court has noted that “our prior cases do permit delay in bringing a suspect before a magistrate when the suspect wishes to make a statement.” *Id.* (citations omitted). Furthermore, “delay in taking an accused who is under arrest to a magistrate after a confession has been obtained from him does not vitiate the confession under our prompt presentment rule.” Syl. Pt. 4, *Humphrey*, 177 W. Va. at 266, 351 S.E.2d at 614.

“Under our prompt presentment rule, the significant time period when an accused is in police custody is the time between the arrest or the time probable cause exists to arrest and the time a statement is obtained from the accused.” *Humphrey*, 177 W. Va. at 269, 351 S.E.2d at 617-18. “Under this rule, the focus is not so much on the length of the detention but whether the

police were primarily using the delay in bringing the defendant before a magistrate to obtain a confession from him.” *Persinger*, 169 W. Va. at 136, 286 S.E.2d at 270.

In this case, there is no unreasonable delay in presenting Petitioner to the Magistrate. Sergeant McKenzie had obtained a statement from Ms. Richardson admitting that she and Petitioner had a plan to kill her husband. (App. 2 at 10.) Sergeant McKenzie obtained a warrant for Petitioner’s arrest. (App. 2 at 11-2.) Petitioner was apprehended in Greenbrier County. *Id.*

Petitioner is correct that because Petitioner was arrested, the Prompt Presentment rule was triggered. However, there is no requirement that Petitioner be taken directly from arrest to the Magistrate for presentment before processing. That is especially true as Petitioner was exhausted, hot, hungry, and thirsty. (App. 2 at 32, 39.)

Sergeant McKenzie was not present at the time of the arrest, but arrived a few minutes later and took custody of Petitioner at approximately 4:49 p.m. (App. 2 at 12-3, 32, 39.) Sergeant McKenzie and Corporal Richards transported Petitioner to the detachment for processing. *Id.* They arrived at the detachment at approximately 5:10 p.m. (App. 2 at 32, 39.) The entire time it took for transporting Petitioner was twenty-one (21) minutes. To the extent that Petitioner would contend that the time transporting him to the detachment amounted to an unreasonable delay, this Court has clearly stated that “[c]ertain delays such as delays in the transportation of a defendant to the police station . . . do not offend the prompt presentment requirement.” *Rogers*, 231 W. Va. at 210-11, 744 S.E.2d at 320-21 (citations omitted).

While being transported, Petitioner informed Sergeant McKenzie that he wished to make a statement. (App. 2 at 43, 59.) As soon as Petitioner informed Sergeant McKenzie that he wanted to make a statement, the concern of the Prompt Presentment rule ceased to exist. The Prompt Presentment rule’s concern is with unreasonable delay for the purpose of obtaining a

confession. *Rogers*, 231 W. Va. at 210-11, 744 S.E.2d at 320-21; *Persinger*, 169 W. Va. at 136, 286 S.E.2d at 270. There can be no unreasonable delay when Petitioner was the one who requested to make a statement. Moreover, this Court has expressly held that “our prior cases do permit delay in bringing a suspect before a magistrate when the suspect wishes to make a statement.” *Rogers*, 231 W. Va. at 210-11, 744 S.E.2d at 320-21 (citations omitted). As such, the time that it took for Petitioner to be informed of his *Miranda* rights and for Petitioner to make his statement, does not amount to unreasonable delay.

Corporal Davis noted that the police already had one (1) side of the story (Ms. Richardson’s side) and that Petitioner wanted to give his side of the story. (App. 2 at 59-60.) Furthermore, it was not clear if Petitioner was making a confession at this time as his request was to make a statement and there was no language suggesting whether or not his statement would be incriminating.

When they first arrived at the detachment at 5:10 p.m., Petitioner was given refreshment and allowed to cool down. (App. 2 at 19.) Sixteen (16) minutes after arriving at the detachment, at 5:26 p.m., Petitioner had his *Miranda* rights explained to him. (App. 2 at 14.) It took nine (9) minutes for Sergeant McKenzie to go over the form with Petitioner. Petitioner signed and dated the statement at 5:35 p.m. (App. 2 at 16, 39.) *Id.* Surely, the sixteen (16) minutes that it took to give petitioner food and drink and to cool down and the nine (9) minutes that it took to explain Petitioner’s *Miranda* rights does not amount to unreasonable delay.

From 5:35 p.m. to 7:23 p.m., Sergeant McKenzie and Corporal Davis spoke to Petitioner to get his side of the story, including asking and answering questions. (App. 2 at 19.) Petitioner said that he felt more comfortable not being recorded and Sergeant McKenzie stated that it is better to talk informally first so that the recorded statement would be “smooth” and without

interruption of unnecessary questions. (App. 2 at 50-1, 63-4.) The initial statement time took less than two (2) hours. Then, from 7:23 p.m. to 9:47 p.m., Petitioner gave a recorded statement. (App. 2 at 33, 39.) Instead of taking time to write out the statement, a recorded statement was made. The recording time took under two and a half (2 ½) hours. The total time Petitioner spent giving his statement to police was less than four and a half (4 ½ hours). To the extent that Petitioner would contend that the time for obtaining and then for recording Petitioner's statement amounted to an unreasonable delay, this Court has clearly stated that "[c]ertain delays such as delays in the . . . recordation and transcription of a statement . . . do not offend the prompt presentment requirement." *Rogers*, 231 W. Va. at 210-11, 744 S.E.2d at 320-21 (citations omitted).

Following the recorded statement, Petitioner was fingerprinted and then "transported directly to the Magistrate Court." (App. 2 at 42.) To the extent that Petitioner would contend that the time for processing Petitioner's fingerprints and for transporting him to the Magistrate amounted to an unreasonable delay, this Court has clearly stated that "[c]ertain delays such as . . . completion of booking and administrative procedures . . . and the transportation of a defendant to the magistrate do not offend the prompt presentment requirement." *Rogers*, 231 W. Va. at 210-11, 744 S.E.2d at 320-21 (citations omitted).

Petitioner's claim that "[t]he record from the lower Court proceedings is riddled with inconsistencies" is without merit. Pet'r's Br. at 18. First, Petitioner argues that the fact that Corporal Davis was not present when Petitioner informed Sergeant McKenzie that he wanted to make a statement makes it impossible for Corporal Davis to have known to call Sergeant McKenzie and inform him that he would be willing to meet him at the detachment to help.

Pet'r's Br. at 19. The Trial Court found that "Corporal Davis heard on the radio that [Petitioner] was in custody" and then "called Sergeant McKenzie" and "offered his help." (App. 1 at 27.)

Additionally, Petitioner ignores the actual testimony of Sergeant McKenzie when he claims that Sergeant McKenzie's testimony that no discussion took place with Petitioner during the transport to the detachment and that Sergeant McKenzie's testimony that Petitioner requested to make a statement during transport are conflicting. Pet'r's Br. at 19. A look at the actual testimony reveals that the two (2) sets of questions are unrelated to each other. In the first set of questions, Sergeant McKenzie was asked "[d]id you talk to him or ask him any questions concerning the crime during the transport?" (App. 2 at 13.) Sergeant McKenzie responded, "[n]o, nothing about the crime." *Id.* Sergeant McKenzie was very clear that he did not interrogate Petitioner regarding the crime. *See id.* The question related to whether there was an interrogation that took place in the car before they arrived at the detachment and reviewed Petitioner's *Miranda* rights. Sergeant McKenzie explained that no discussion of the crime took place in the cruiser before Petitioner was *Mirandized*. *See id.* Later, Sergeant McKenzie was asked a similar question:

Q. And there was no conversation about the crime or why he was in custody from Second Creek to Lewisburg?"

A. He was told he was under arrest for the crime of first degree murder. Other than that there was no discussion.

Q. Did you talk about anything?

A. Not with him. Richards and I had a discussion. The thing is, sir, I knew that without him being *Mirandized* that I didn't need to speak with him about any part of the crime, therefore, I didn't until he was read his *Miranda* Rights.

(App. 2 at 38.) In the second set of questions, Sergeant McKenzie was responding to a question as to why he did not take Petitioner directly to the Magistrate:

Q. Is there any reason you couldn't have taken him to the Magistrate's office at 5:10?

A. No sir, I don't guess there was.

Q. Did you think about doing that?

A. The reason that I did not do that was when [Petitioner] was advised that he was under arrest he stated that he wanted to tell his side or make a statement about what his side of it was. That was made sometime between the time he was arrested and the time we got to Lewisburg.

Q. I'm sorry, I wrote down a minute ago – let me find it. I was asking you about the conversation between Second Creek and Lewisburg and you said you didn't talk to him about the case, that you and Richards talked, but you didn't talk to him.

A. I didn't talk about the case, sir. He said that he wished to make a statement about his side of the story. I didn't discuss the case with him.

(App. 2 at 42-3.) Nothing about Sergeant McKenzie's answer to the first set of questions is in conflict with his answers to the second set of questions. The one (1) is focused upon possible interrogation regarding the crime where *Miranda* issues would be at stake. The other is focused upon Petitioner's request to make a statement. The two (2) answers are not in conflict.

Petitioner also alleges that his statement "was only 'partially' at the Petitioner's suggestion." Pet'r's Br. at 14-20. Petitioner wholly mischaracterizes the evidence. The unrecorded statement was discussed during Petitioner's recorded statement:

Q. We talked awhile prior to this taped conversation. Is that correct?

A. Yes, sir, we did.

Q. And that was partially your suggestion, too; is that right?

A. Yes, I was in full agreement with it.

(App. 4 at 26.) That discussion does not mean that Petitioner was only partially suggesting that he give a statement and that the officers were partially suggesting that Petitioner give a

statement. To the contrary, Petitioner had already requested to give a statement and had already been *Mirandized*. The discussion referred to the decision to begin with an unrecorded statement prior to giving a recorded statement. Petitioner wanted to start with an unrecorded statement because he felt more comfortable and the officers wanted to start with an unrecorded statement because it made the recorded statement go smoother. (App. at 20, 50-1.)

Petitioner's argument that "two hours of unrecorded colloquy" was a violation of the Prompt Presentment rule is without merit. Pet'r's Br. at 15. However, Petitioner does not acknowledge what the facts show: that during that time Petitioner was giving an unrecorded statement. Instead, Petitioner acts as if the delay is to convince Petitioner to make a statement. To the contrary, the facts show that the unrecorded statement was given after Petitioner requested to give a statement and after he was *Mirandized*. There can be no "coercive influence on his decision to give a statement" when he had already decided to give a statement, when he was informed of his rights and waived his rights, and when he was actually giving a statement, albeit an unrecorded statement. The police decision to have a recorded statement made instead of a written statement following the unrecorded statement does not make the unrecorded statement coercive.

When the totality of the circumstances is viewed, it is clear that none of the delays were for the purpose of obtaining a confession. The delays involved, transportation, processing, *Mirandizing*, and obtaining a requested and voluntary statement from Petitioner. If "the significant time period . . . is the time between the arrest . . . [until] the time a statement is obtained from the accused," then it should be clear that from the time of the arrest until Petitioner requested to make a statement was a matter of minutes. (App. 2 at 12-3, 43, 59); *see also*, *Humphrey*, 177 W. Va. at 269, 351 S.E.2d at 617-18.

Therefore, because Petitioner was arrested a few minutes before Sergeant McKenzie arrived; because transportation of Petitioner to the detachment for booking took only twenty-one (21) minutes; because the time for Petitioner to cool off and to have something to eat and something to drink only took sixteen (16) minutes; because it took only nine (9) minutes to explain the *Miranda* rights; because Petitioner voluntarily requested to give a statement with his side of the story; because Petitioner's initial unrecorded statement took less than two (2) hours; because Petitioner's recorded statement took less than two and a half (2 ½) hours; because immediately after Petitioner gave his statement, he was fingerprinted; and because after Petitioner was fingerprinted, he was transported directly to the Magistrate for processing, this Court should affirm the Trial Court's denial of Petitioner's Motion to Suppress and the Trial Court's admission of Petitioner's statement at trial.

V.

CONCLUSION

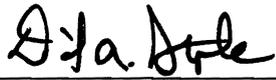
For the foregoing reasons and others apparent to this Court, this Court should affirm Petitioner's conviction and sentence.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent,

By Counsel,

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CERTIFICATE OF SERVICE

I, David A. Stackpole, Assistant Attorney General and counsel for Respondent, do hereby verify that I have served a true copy of *RESPONDENT'S BRIEF* upon counsel for Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 14th day of May, 2015, addressed as follows:

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