

**FILE COPY**

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

**STATE OF WEST VIRGINIA,  
ex rel. Cesar Felix  
Petitioner,**

**vs.**

**Upon Original Jurisdiction  
in Prohibition,  
No. 20-0601  
Monongalia County Case No. 20-F-63**



**THE HONORABLE PHILLIP D. GAUJOT,  
CIRCUIT COURT JUDGE OF MONONGALIA  
COUNTY, WEST VIRGINIA  
Respondent.**

**DO NOT  
FILE**

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**PETITION FOR WRIT OF PROHIBITION**

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CERTIFICATE OF SERVICE

I, Stephen S. Fitz, do hereby certify that on the 13 day of August, I served the foregoing  
PETITION FOR WRIT OF PROHIBITION & APPENDIX by hand-delivery to the following:

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## **PETITION FOR WRIT OF PROHIBITION**

To the Honorable Justices of the Supreme Court of Appeal of the State of West Virginia:

Comes now the Petitioner, State of West Virginia, by and through Stephen S. Fitz, Assistant Prosecuting Attorney for Monongalia County, West Virginia, and petitions this Honorable Court to award a Writ of Prohibition against the Respondent, the Honorable Judge Phillip D. Gaujot, in his official capacity as Circuit Court Judge in Monongalia County, West Virginia.

### **QUESTION PRESENTED**

Whether the Honorable Phillip D. Gaujot, Circuit Court Judge for Monongalia County, West Virginia, (hereinafter "Respondent") made a clearly erroneous and arbitrary and capricious ruling when he excluded the State's DNA evidence and the Defendant's Statement that were both provided voluntarily to the Police in a non-custodial interview on the basis that the Defendant did not knowingly and intelligently waive his "constitutional rights" and because the interpreter, a family member and friend, hired by the defendant asked more questions than the Detective.

### **STATEMENT OF CASE**

The Morgantown Police Department was investigating a sexual assault alleged to have occurred after hours at the Casa D'Amici restaurant, on an intoxicated female patron (hereinafter "victim") on May 14, 2016. The victim described a "Mexican Looking" man (hereinafter "Defendant") took her in his car and parked in a gravel lot and sexually assaulted her at about 4:30 a.m. Morgantown Police were dispatched to the area of Weaver and Richwood Avenue where officers met up with the victim. The victim stated the Defendant said he would take her home. She got in his car and subsequently lost consciousness. When she awoke, the Defendant and the victim were parked in a gravel parking lot and the Defendant began to kiss her on the

mouth and neck, exposed her breast, and began to kiss her breast. The victim states the Defendant pulled down her pants and underwear and grabbed her wrist while he had his pants down. The victim stated she struggle with all her might and screamed and eventually broke free. She was not sure if he had penile penetration but she believes he digitally penetrated her vagina. The Victim was taken to the hospital around 6:00 a.m. within hours of the alleged assault and had a Sexual Assault Nurse Exam performed by a SANE nurse.

The victim went to Casa D'Amici the next day and asked to see video of the early morning when she was a customer. She identified the Defendant as a possible suspect who was also an employee of the establishment. Detective Trejo, left a message on three separate occasions with the Manager to have the Defendant, Cesar Felix, contact him.

#### **PERTINENT FACTS FROM SUPPRESSION HEARING**

Almost three months after the alleged sexual assault, the Defendant requested a family member, Stephanie Mayhew ("Ms. Mayhew") to contact the police and act as an interpreter for him. So, on August 3, 2016, Ms. Mayhew contacted Detective Trejo and was advised by Detective Trejo that he was investigating a sexual assault. Ms. Mayhew not only considered herself a family member of the Defendant's, but she is a freelance translator. Detective Trejo did not state that the Defendant was a possible suspect, but did add he was investigating a sexual assault. Ms. Mayhew asked if she and the Defendant could come in the station to give a statement and that she would act as an interpreter. She advised the Defendant wanted to come that day to give a statement (**Appendix Two: Transcript Page 44-45**).

The Defendant came in with his baby and with Ms. Mayhew. The officer performed a non-custodial interview with the Defendant. The Defendant denied having any sexual contact with the defendant and denied taking her anywhere in his car. Ms. Mayhew stated the Defendant



would provide a DNA sample. In addition to the Defendant's oral permission, the officer provided a written "permission to search form" as further evidence of the voluntariness of the search, which is attached hereto as Exhibit A (**Appendix page 16**). Ms. Mayhew reviewed the form with the Defendant. The form was then executed by Ms. Mayhew, the Detective and the Defendant. The Defendant then performed an oral swab on himself on the inside of his cheeks and provided that sample to the Detective. The Defendant, his baby, and Ms. Mayhew then left the police station. There is no allegation or evidence that the Defendant was ever in custody. There was also no evidence that the Defendant did not understand any questions during the interview. In fact, Ms. Mayhew testified that she believed the Defendant understood everything. Detective Trejo, who understands some Spanish, indicated that it appeared to him the Defendant understood everything (Transcript page 45-46)

Ms. Mayhew, a freelance interpreter, testified that at the interview she was acting on the behalf of the Defendant as his friend and family member as she has done for the family numerous times. She also stated that since he denied having any contact with the girl, she thought it was a good idea to provide his DNA to exonerate him. She thought he was innocent based on her conversation with the Defendant. So, the Defendant voluntarily provided a DNA sample, both verbally and in writing with the benefit of the translator and family member he brought with him (Transcript 44-46)

Only two witness were presented, Detective Trejo and Ms. Mayhew. There was not one question asked by Defense counsel regarding the issue of whether the Defendant was in custody. When questioned by the State, Detective Trejo stated he did not read the Defendant his Miranda rights because it was a non-custodial interview and the Defendant wanted to come in and give a statement. The Detective further testified that he advised before they came in that he was

investigating a sexual assault. Ms. Mayhew was not asked one signal question by Defense regarding the Defendant being in custody. However, when asked by the State if she felt the Detective did anything to make anyone feel in custody or felt not free to leave, she stated "No." Finally, the State had her review the video of the interview and a transcript of the interview before the hearing. Ms. Mayhew was then asked if she believed Mr. Cesar Felix understood what was going on in that interview and she stated "yes I do". She also advised that she was at the interview as his friend and family member and that she believed Mr. Felix gave his DNA voluntarily and that he even swabbed himself. The Defendant did not testify, as such the only evidence presented was that the Defendant knew what was going in the interview and that he gave his DNA and his statement voluntarily in a non-custodial setting.

#### **SUMMARY OF ARGUMENT**

The Court suppressed the statement given by the Defendant and suppressed the result of the DNA evidence on the basis that the Defendant did not knowingly and intelligently waive his constitutional rights and that the interpreter acted beyond the scope of being an interpreter. (see **Appendix page 17, "ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS DNA AND DEFENDANT'S STATEMENT" hereinafter "ORDER"**). The Defendant came to the police station on his own accord, with his baby and was never in custody. He left after the interview and was not arrested until over two years later when the DNA results were finally returned. No finding was made by the Court that the Defendant was in custody or ever felt he was in custody (**ORDER Appendix page 17**). The DNA of the swabs the Defendant voluntarily provided showed that he had sexual contact with the victim. Additionally, there is no allegation that the Defendant did not understand the questions asked of him. The Court ruled that the translator, privately brought in by the Defendant, acted beyond her scope by asking questions of



the Defendant. The Court felt the Translator, who was brought in by the Defendant, acted against the Defendant's interest. However, State action is required to suppress a statement based on Miranda or based on an unreasonable search. The translator/family friend is not the agent of the State in this matter. The conduct of the translator/family member brought in privately by the Defendant is not State action. The Court must find that the defendant was in a custodial type of interrogation before ruling that the Defendant did not voluntarily waive his rights and ruling that the Defendant's statement and DNA results are suppressed. There was no evidence to support any **custodial** questioning and thus no finding was made thereof (**ORDER, Appendix page 17**). There was no argument made by the Defendant that he was in custody. There was no evidence presented by the Defendant that he was in custody. There was no finding by the Court that the Defendant was in custody. As such, the Court incorrectly and with no legal basis, suppressed the voluntary statement made by the Defendant and suppressed the DNA sample he voluntarily provided to the Detective demonstrated by his verbal consent and written consent. The Court suppressed a voluntary statement without an argument or facts even being made with regard to the Defendant being in custody. The Court suppressed evidence voluntarily handed over to the police.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISIONS**

Your Petitioner asserts that this matter should be considered for oral argument under Rule 19 of the West Virginia Rules of Appellate Procedure insofar as the issues joined herein involve: (1) a case involving assignments of error in the application of settled law; (2) a case claiming an unsustainable exercise of discretion where the law governing that discretion is settled; and (3) a case involving a narrow issue of law. However, the issue is so straightforward that a memorandum decision may be warranted under the circumstances.

## **ARGUMENT**

### **A WRIT OF PROHIBITION IS THE SOLE MECHANISM FOR PETITIONER TO CONTEST RESPONDENT'S RULINGS**

Petitioner seeks issuance of a Writ of Prohibition prohibiting enforcement of the trial court's order which suppressed the Statement and the DNA evidence obtained voluntarily from the Defendant by the Detective. The Court provided no legal reasoning or analysis. The Court was only concerned that the Defendant did not waive or understand his constitutional rights (only important in a custodial interview) and that the interpreter, who was hired by the Defendant, acted beyond her scope (not State action).

The matter before the Court is so elementary, so basic and so fundamental and well settled that this court should issue the Writ of Prohibition. The Court, in suppressing the DNA results voluntarily given to the Detective by the Defendant has stripped the State of the most compelling and forceful scientific evidence demonstrating sexual contact between the victim and the Defendant, contact that he denied having during his voluntary interview.

"In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, the court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief, (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal, (3) whether the lower tribunal's order is clearly erroneous as a matter of law (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law, and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point

for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.” Syl. Pt. 4, State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E. 2d 12, (1996).

Petitioner has no recourse to address the erroneous order of the Respondent other than its petition for issuance of a Writ of Prohibition. “Our law is in accord with the general rule that the State has no right to appeal in a criminal case, except as may be conferred by the Constitution or a statute.” Syl. Pt. 3, State v. Lewis 188 W.Va. 85, 422 S.E.2d 807, (1992), Syl. Pt. 1, State v. Jones, 178 W.Va. 627, 363 S.E. 2d 513 (1987).

Respondent’s rulings were clearly wrong in light of the facts in this case and their application to well settled law. Granting a Writ of Prohibition is appropriate when the State can demonstrate that a court’s ruling was so “flagrant” as to deprive it of the ability to prosecute its case. Syl. Pt. 5, State v. Jones, 178 W.Va. 627, 363 S.E.2d 513 (1987). The victim herein provided the Detective with an identification of the Defendant but could only say he was “Mexican” looking. The DNA in this matter, that was provided voluntarily to the Detective, scientifically and irrefutably links the Defendant, Cesar Felix, to the sexual assault. A sperm fraction was identified in the vaginal area of the victim. Sexual Assault cases are manifestly difficult. The victim in this matter was highly intoxicated when she struggled to resist the Defendant, a total stranger to herself. The DNA evidence that was collected voluntarily from the Defendant is absolutely necessary. It is compelling evidence, particularly in light of the Defendant’s statement that he never touched the victim, never had her in his car, and never had any sexual contact.

**RESPONDENT WAS CLEARLY WRONG TO EXCLUDE THE DEFENDANT'S  
STATEMENT AND DNA EVIDENCE THAT WAS VOLUNTARILY GIVEN TO THE  
DETECTIVE**

The issue in this matter is whether a Defendant, who comes into a police station voluntarily and gives a non-custodial interview and voluntarily provides a DNA sample must be advised of his Miranda rights? The answer is No. This is a concept so simple and fundamental in criminal law. Miranda warnings are only required when a defendant is subjected to a custodial interrogation. A defendant who voluntarily goes to a police station comes at his own peril. Officers are not required to explain to them that they should seek out legal counsel first or offer up a litany of constitutional rights. It is black letter law that a defendant need only be advised of his constitutional Miranda warnings when he is in **custody** and being **interrogated**. Voluntary statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected. It goes without saying that evidence voluntarily handed over is not barred from admissibility in a non-custodial situation. **Miranda v. Arizona**, 384 U.S. 436 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Again, in **United State v. Jones**, 818 F.2d 1119 (4<sup>th</sup> Cir. 1987), the Court reiterated that Miranda warnings need not be given if there is no custodial interrogation. The issue that could arise in this matter is whether the Defendant had otherwise been deprived of his freedom of action in any significant way. Defense counsel presented no evidence on this issue of custody, because factually, there was absolutely nothing to present. Not only did defense counsel not raise the issue of custody at the suppression hearing, but in Motion to Suppress, the issue of custody was not raised, despite citing Miranda as his supportive authority. **(Defendant's Motion to Suppress Evidence, Appendix pages 5-10)** The facts are simple. The Defendant came into the station on his own accord holding his young child in his arms. He voluntarily gave a

statement with his baby in his arms and left after the interview. Under any objective person test, no evidence was presented during the suppression hearing that could be construed that the Defendant was in custody. The Defendant's ignorance of the law and his lack of understanding of his rights is not a reason for his statement to be suppressed. If that was the law, 99.98% of all voluntary statements would not come in.

The law is clear in federal courts and in West Virginia Courts that police only need to advise defendants of their rights and obtain a voluntary waiver thereof when there is custodial questioning. Miranda principles come into play only when a suspect is subjected to custodial interrogation. **California v. Beheler**, 463 U.S. 1121, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983); **Oregon v. Mathiason**, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977); **State v. McDonough**, 178 W.Va. 1, 357 S.E.2d 34 (1987); **State v. Blaney**, 168 W.Va. 462, 284 S.E.2d 920 (1981); **State v. Rowe**, 163 W.Va. 593, 259 S.E.2d 26 (1979). Custodial questioning as defined by Miranda means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444, 86 S.Ct. at 1612. **State v. Holland**, 178 W.Va. 744, 364 S.E.2d 535 (W. Va. 1987). If an individual comes to the police station on his own accord, is never placed in custody and never has his freedom affected in any matter and voluntarily speaks with the police and volunteers evidence and leaves thereafter, the police have no obligation to advise him of his right to refuse or leave. The Defendant's lack of knowledge of his rights is not determinative.

The Court and the Defendant place emphasis on the statement that the Defendant did not know why he was there giving a statement. First, this is not relevant in making the legal decision. But even so, it is irrelevant, because if there is anyone who know more than anyone, more than the police, more than his translator/friend, more than even the victim, it was the



Defendant. He is in a better position than anyone to know why a fraction of his sperm is present on the victim's vaginal area. He knew exactly why he was there, he just thought, like most defendants, that he could lie and claim ignorance and dupe everyone.

If there is an issue at all in this case, it is that the Defendant did not understand the officer's questions or those questions asked of him because of the language barrier. However, there is no evidence that he did not understand. In fact, the only evidence presented, that of the Detective and the Defendant's own family member/translator, is that he did understand. The State submits that the translator/family member summed it up succinctly and efficiently when she stated under oath "It's not my fault he lied to me." (**Appendix Two, Transcript pages 39-40**)

### **CONCLUSION**

For the reasons set forth herein, Petitioner respectfully requests this Honorable Court find the order suppressing the Defendant's voluntary statement and the DNA results obtained after the Defendant voluntarily providing mouth swabs to the Detective was clearly erroneous, arbitrary and capricious and exceeded the Respondent's legitimate powers. It is just plain wrong. Petitioner further requests this Honorable Court find the relief requested in this matter is appropriate and issue a Writ prohibiting enforcement of the trial court's order.


### **VERIFICATION**

**STATE OF WEST VIRGINIA,**

**COUNTY OF MONONGALIA, TO-WIT:**

**I STEPHEN FITZ, being first duly sworn, deposes and says that the facts and**

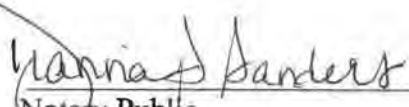
allegations contained in the foregoing Petition are true, except insofar as they are therein stated to be upon information, and that insofar as they are therein stated to be upon information, he believes them to be true; and that all the exhibits attached to the foregoing Petition are true and correct copies.

  
Stephen S. Fitz

Taken, subscribed and sworn to before me this 13<sup>th</sup> day of August, 2020.

My Commission expires:

May 25, 2023

  
Notary Public

