

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 20-0601**

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

v.

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



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

**CESAR FELIX'S SUMMARY RESPONSE
TO WRIT OF PROHIBITION**

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CESAR FELIX’S SUMMARY RESPONSE TO WRIT OF PROHIBITION

NOW COMES the Defendant below, Cesar Felix, by counsel, Matthew C. Brock, Esq., and hereby files his summary response, pursuant to Rule 16(h) of the Revised Rules of Appellate Procedure, to the Petition For Writ Of Prohibition (“writ”).

**CESAR FELIX’S ADDITIONS TO THE STATEMENT OF THE CASE AND
PERTINENT FACTS FROM SUPPRESSION HEARING**

Counsel of record for Cesar Felix (“Felix”), Matthew C. Brock, hereby states that certain facts and details need clarified from Petitioner’s *Statement of the Case*, and that the following relevant facts are clarification to the Petitioner’s provided *Statement of the Case*.

State actor, Detective Danny Trejo (“Det. Trejo”) of the Morgantown Police Department (“MPD”), who was assigned to the investigation of an alleged sexual assault, and who sought for questioning a man named Cesar Felix, a native Mexican residing in the Morgantown area and whose primary language is Spanish, was contacted via telephone by a Stephanie Mayhew now

known as Stephanie Murillo (“Mayhew”) regarding Felix. Mayhew represented herself as a friend of Felix and freelance “translator”, although she was never certified by any agency or government as a translator, and represented to Det. Trejo that Felix had become aware that Felix was generally sought for questioning, like his co-workers were, by Morgantown Police regarding the presence of a young woman who appeared at Felix’s place of employment, the *Casa di Mici* restaurant (“Casa”), in May of 2016. During the telephone conversation between Mayhew and Det. Trejo, Det. Trejo indicated to Mayhew that he sought Felix for questioning regarding an alleged sexual assault, but Det. Trejo never once indicated that Felix himself was a suspect—a critical lack of disclosure— and especially never indicated that Felix was *the* suspect. (emphasis added). (**App. Two, page 6, lines 16-19**). Mayhew testified that she herself was never apprised that Felix was the suspect prior to the interview (**App. Two, Pg. 31-32**); that she believed that everyone who worked at *Casa di Mici* on the night of the alleged assault was sought for questioning; and that two “black guys” were suspects. (**App. Two, page 31, lines 9-11**). Later that day, Mayhew and Felix presented to MPD to provide information to Det. Trejo about the young woman’s presence at *Casa*.

After Mayhew and Felix arrived at MPD for the interview, and as Det. Trejo began the questioning, Mayhew took over. Mayhew began asking questions to Det. Trejo and then to Felix. This was despite her being asked by Det. Trejo to translate word-for-word. Approximately eighty-nine (89) questions were asked during the interview, which lasted around forty-five (45) minutes. Of the 89 questions asked in total, Mayhew asked approximately sixty-seven (67) questions that were not questions from Det. Trejo translated by Mayhew, leaving approximately twenty-two (22) questions asked by Det. Trejo that Mayhew translated for Felix. Mayhew testified that of the approximately 89 questions asked in total, that 67 asked by her is probably an accurate figure. (**App. Two, Pg. 36, lines 18-21**).

Mayhew's questioning continued to the extent that by the end of the interview, she had become the "interviewer" in a sense, by asking over three times as many questions as the actual interviewer, Det. Trejo. Forty-six (46) of Mayhew's questions were directed at Felix, and unprompted by Det. Trejo. As if that was not enough, Mayhew proffered information to Det. Trejo and gave him answers to questions that were never posed to Felix at any time. Seventeen (17) times Mayhew provided information or answers on her own and without asking Felix for the answer or even relaying the original question to Felix. These were not translated answers which Felix proffered in Spanish for Mayhew to translate in English to Det. Trejo.

At no point did Det. Trejo ask Mayhew to cease her questioning and to maintain her role as a translator, nor did he ever disregard Mayhew's answers or information in order to give Felix the opportunity to confirm or deny the same himself. It appeared from the interview recording that Mayhew was assisting Det. Trejo's investigation, based on her actions, and based on Det. Trejo's inaction. Mayhew was not even certified to translate, but Det. Trejo never sought to check her qualifications, and certainly never asked Mayhew what her qualifications were prior to permitting her to "freelance" translate at his Police Station. Det. Trejo testified that when MPD seeks to interview a person not fluent in English, MPD would "actually contact an agency that does have someone that's fluent", and agreed that it would be a translator who is "certified by some organization or some government entity" (**App. Two, Pg. 25, lines 7-12**); could not say whether Mayhew even met such criteria (**App. Two, Pg. 25, lines 16-19**); and never disputed that Mayhew "volunteered information from herself without that information coming from Mr. Felix." (**App. Two, Pg. 25-26**).

Subsequently, Mayhew convinced Felix to sign a *Permission to Search* form and submit his DNA despite Det. Trejo never asking Felix to submit his DNA. (**App. Two, Pg. 16, lines 5-8**).

Det. Trejo testified that he failed to explain or even discuss any Constitutional Rights to Felix, and specifically that means he never discussed with Felix that he had a right to privacy and could exercise that right in refusing a DNA swab. This contradicts the *Permission to Search* form signed by Det. Trejo, Felix, and Mayhew, which expressly states that Det. Trejo “informed” Felix of his Constitutional Right to refuse the search.

ARGUMENT

I. The Writ of Prohibition is Not Appropriate Here, and is Not the Sole Remedy for Petitioner

W.Va. Code §53-3-1 generally states a writ of prohibition shall lie as a matter of right when the inferior court does not have jurisdiction over the subject matter or, having such jurisdiction, exceeds its legitimate power. Further, a writ of prohibition, like writs of mandamus and habeas corpus, is an extraordinary remedy and should only be issued in extraordinary causes. *State ex rel Suriano v. Gaughan*, 198 W.Va. 339, 480 S.E.2d 548 W.Va. 1996. In determining whether to issue a writ of prohibition, “this Court will look to the adequacy of other available remedies such as an appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is to corrected in advance.” Syl. Pt. 1 *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 W.Va. 1979.

There is a low probability the Monongalia County Circuit Court trial [decision] will be completely reversed if this writ is not issued. The net result likely to remain the same, i.e. that the State will continue to pursue the criminal charges against the Defendant, Cesar Felix at trial. The State is in possession of, and has provided Defense Counsel herein with other items of evidentiary

value, including and specifically the other employees' statements; the alleged victim's statements which would, at trial, become live testimony; photographs of the Defendant's vehicle; surveillance video footage from inside *Casa* from the night in question; and evidence supplied by the translator, Mayhew, regarding the purported location of the house Felix allegedly attempted to take the victim to. DNA evidence is "compelling and forceful and scientific evidence", but the inability to utilize the DNA does not in any way foreclose the Petitioner's ability to continue to prosecute Felix. If Petitioner fails to prevail at trial, then an appeal is possible remedy. However, Petitioner cannot use this Court to cure deficiencies in the investigative process to ensure a conviction.

"Where prohibition is sought to restrain a trial court from the abuse of its legitimate powers, rather than to challenge its jurisdiction, the appellate court will view each case on its own particular facts to determine whether a remedy by appeal is the available and adequate, and only if the appellate court determines that the abuse of power is so flagrant and violative of petitioner's rights as to make a remedy by appeal adequate, will a writ of prohibition issue." Syl. pt. 2, *Woodall v. Laurita*, 156 W.Va. 707, 195 S.E.2d 717 (1973). Here, the Court's decision to suppress the statement and DNA was in no way an abuse of power, but a check on abusive State power, and was made in order to protect the Defendant's rights, and after considering all the facts and testimony proffered through the State's witnesses at the suppression hearing, and this decision was well within Respondent's authority. The Petitioner's rights have not been violated.

II. The Respondent Properly Suppressed the Evidence When It Found that the Defendant's Statement and DNA Were Not Given Knowingly, Voluntarily, or Intelligently

"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. 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.” Sy. Pt. 1, *State v. Lacy*, 196 W.Va. 104, 468 S.E.2d 719 (W. Va. 1996). Conversely, this Court should construe all the facts in the light most favorable to the *Defendant below*, Felix, because he was “the prevailing party below”, and the Respondent’s decision to suppress the statement and DNA in favor of the Defendant should be given “particular deference” here, because it was made following the Court hearing the specific facts and observing the witnesses while giving their testimony. (Emphasis added).

“The State must prove, at least by a preponderance of the evidence, that confessions or statements of an accused which amount to admissions of part or all of an offense were voluntary before such may be admitted into the evidence of a criminal case.” Syl. Pt. 5, *State v. Starr*, 158 W. Va. 905, 216 S.E.2d 242 (1975). The sudden and unexpected departure from what Felix agreed to participate in affected the voluntariness of Felix’s statements, and were obtained in violation of his right to remain silent pursuant to the Fifth Amendment to the Constitution of the United States and Article III-5 of the Constitution of West Virginia. As the interview at MPD began, Det. Trejo proceeded to ask questions of Felix via Mayhew, the translator, as Felix volunteered to do. Mayhew understood that she was only supposed to translate “word for word” for Felix and Det. Trejo (**App. Two, Pg. 36, lines 5-7**) and Det. Trejo specifically asked Mayhew to translate “word for word” (**App. Two, Pg. 10, lines 1-3**). That did not happen though. Felix began answering basic questions regarding his address, social security number, weight, and within just a few minutes, Mayhew began interjecting. Felix answered some questions at the interview, while Mayhew answered many of the questions and proffered most of the information in that interview without Felix being involved in the answering process. Mayhew also proceeded to make herself the interviewer by asking questions, sua sponte, to Det. Trejo in English and potentially beyond the

comprehension of Felix, as well as to Felix in his native Spanish language. The volume of questions from Mayhew compared to the very few questions asked by Det. Trejo was so disproportionate (more than 3:1) that it renders the entire interview involuntary. Felix agreed to answer questions by Det. Trejo. No evidence by the State showed that Felix ever agreed to be double-teamed. No evidence by the State showed that Felix ever agreed to have Mayhew conduct this interview or to answer on his behalf, other than for her to translate his words. She acted outside and beyond her scope as a translator and Det. Trejo failed to reign her in, failed to maintain control of his interview while failing to assure that Felix's will was not overborne by the sudden change in circumstances and overpowering atmosphere where the translator suddenly teamed up with law enforcement against him.

Det. Trejo failed in many ways during his investigation which worked to the prejudice of Felix and violated Felix's Constitutional Rights. He first failed to maintain control of his interview and allowed it to manifest into a two-on-one interrogation. No testimony at the suppression hearing showed that Mayhew was given any authority by Felix prior to that recorded interview to answer any questions on his behalf without him first answering them, or that she actually obtained such information directly from Felix in advance of the interview. No evidence was offered at the suppression hearing to support the conclusion that Felix ever supplied Mayhew with any of that information at any time prior to the interview. Det. Trejo also failed to confirm whether Mayhew was fluent and/or certified in translating, or that she was otherwise specifically qualified to translate this important interview, in conformance with standard protocol. Under oath, Det. Trejo agreed that typical protocol within his police agency was to obtain a translator from an agency "that's fluent", and specifically "certified by some organization or some government entity" to do translations (**App. Two, Pg. 25**). Det. Trejo did not dispute that Mayhew failed to meet these

qualifications, nor did he dispute that she “volunteered information from herself without that information coming from Mr. Felix” (**App. Two, Pg. 25-26**). No evidence was adduced to show that he understood any part of the question-and-answer session between Mayhew and Det. Trejo which they spoke exclusively in the English language. The record fails to establish by a preponderance of the evidence, as is required by *State v. Starr*, supra, that the statement was voluntary, and, under the circumstances, such evidence was properly suppressed from admission into evidence by the Respondent.

Det. Trejo’s biggest failure was that he neglected to make sure Felix understood the rights he was waiving prior to signing DNA *Permission to Search* form, thereby violating Felix’s right to privacy under the Fourth Amendment to the Constitution of the United States and of Article III-6 of the Constitution of West Virginia. No evidence was introduced that Felix knew what he was signing regarding submitting to DNA swabs via the *Permission to Search* form, which was attached to the Petition as “**State’s Exhibit A**”. (**App., Pg. 16**). Felix signed a *Permission to Search* form which the Petitioner believes he signed knowingly and voluntarily. This belief is despite Det. Trejo’s admission that Felix was never explained the DNA *Permission to Search* form at any point. Det. Trejo testified that the *Permission to Search* form was “self-explanatory.” (**App. Two, Pg. 24**). The first problem with Det. Trejo’s “self-explanatory” justification is that Felix, a native of the Country of Mexico and a person who speaks little English, required a Spanish-speaking translator, and the *Permission to Search* Form was exclusively in type-print English. At no point did Det. Trejo ask Mayhew to translate the form for Felix, nor did Mayhew endeavor to do so on her own. The second problem with Det. Trejo’s “self-explanatory” justification is that the form itself was expressly contingent on the requirement that “Det. D.A. Trejo...informed” Felix of his “CONSTITUTIONAL RIGHT not to have a search made of the premises and property

owned by me and/or under my care, custody and control, without a search warrant.”. According to the form, the informing Felix of his rights was the necessary condition to Felix “[k]nowing of [his] lawful right to refuse to consent to such a search...” Even if Felix could read the words in the form, it is not reasonable to assume a native Mexican understands United States Constitutional law or jurisprudence. Felix was told to sign despite not knowing what he is signing. The State is excusing the failure by Det. Trejo, who should be held to the standard which the form required: to inform Felix of his “CONSTITUTIONAL RIGHT not to have a search made...” This “self-explanatory” form is a misrepresentation of the truth. It logically follows that because the form required Det. Trejo to inform Felix of his right not to have a search, and because Det. Trejo never explained such rights; what the contents of this form were; or provide a word-for-word translation of the form’s contents, waivers, and rights, then Felix never knowingly, voluntarily, or willingly gave any permission to search his body.

No evidence, aside from testimony regarding Felix’s volunteering to follow up on an unspecified and vague request by Det. Trejo to speak with Felix regarding the alleged sexual assault of a person, and the aforementioned *Permission to Search* form was offered by the State at the suppression hearing supporting the proposition that Felix’s statements and DNA were given voluntarily. None of the statements or answers provided by Mayhew and which were unanswered by and unprompted by Felix, should be admitted into evidence against Felix, when he did not provide such. Felix was never informed that he was a suspect and was never informed that he was free to leave after it became clear that he was *the* suspect. “Limited police investigatory interrogations are allowable when the suspect is expressly informed that he is not under arrest, is not obligated to answer questions and is free to go.” Syl. pt. 2, *State v. Mays*, 172 W.Va. 486, 307 S.E.2d 655 (W. Va. 1983). Conversely, when a suspect is never informed that he is a suspect, and

never informed that as a result of being a suspect he is not obligated to answer questions and is free to go at any time, then the police investigatory interrogations cannot be allowed, absent a clear and expressed showing of voluntariness and awareness of one's rights. Otherwise, deceptive practices are afoot. Since Felix was never informed expressly prior to the interview that he was a suspect, and not told after it became clear he was the suspect that he was free to go and not answer any more questions. "Misrepresentations made to a defendant or other deceptive practices by police officers will not necessarily invalidate a confession unless they are shown to have affected its voluntariness or reliability.'..." *State v. Farley*, 452 S.E.2d 50, 192 W.Va. 247 (W. Va. 1994, citing *State v. Worley*, 179 W.Va. 403, 369 S.E.2d 706 (1988)). Here, the *Permission to Search* form contained clear misrepresentations of the truth, and failed to meet its own requirements, rendering the DNA submission involuntary.

This case shares some factual and legal commonalities with *State v. Lopez*, 476 S.E.2d 227, 197 W.Va. 556 (W. Va. 1996). Like this case, in *Lopez*, the Defendant below, Lopez, was a native Mexican who gave statements to police with the aid of a translator, and later moved the trial Court to suppress his statement because it "was not voluntarily given and was admitted in violation of his constitutional right against self-incrimination.", partly based on the conduct of the interpreter. *Lopez*, 476 S.E.2d 227, 234. It was undisputed that Lopez was read his Miranda Rights prior to answering any questions, and at that time, Lopez was not under arrest, and was not formally charged until approximately two months later. Like Lopez, Felix was not under arrest or formally charged at or immediately after the time of giving the statements, and like the "translator" Mayhew, in *Lopez*, it appeared that "the translator was trying to help the policeman with whom he was in attendance to gather information about what was happening. And he...on his own, was proffering questions that the policeman was not even asking..." aiding the Court in finding for

Lopez and suppressing the statements. *Id.*, at 235. It is also not unimportant that Felix was not read any Miranda Rights after it became clear he was a suspect.

“In determining the admissibility of a confession, ‘the ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.’” *State ex rel. Williams v. Narick*, 164 W.Va. 632, 264 S.E.2d 851 (W. Va. 1980), citing *Culombe v. Connecticut*, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961). In the case sub judice, the statements and DNA submission were not a product of Felix’s free and unconstrained choice, but a product of the translator, Mayhew’s free and unconstrained choice, and quite literally was not a product of Felix at all when he did not even make most of the statements or answers elicited at the interview. No evidence was provided to conclude that he was able to read and understand the *Permission to Search* form, which Det. Trejo and Mayhew neglected to explain the contents of; the rights being waived by signing such; or the consequences of waiving such rights before he signed it. Felix’s capacity for self-determination was critically impaired at that time due to lack of understanding of why he was sought for questioning; lack of understanding the type-printed English *Permission to Search* form; and the failure by Det. Trejo to make sure Felix understood and was informed of his Constitutional Rights. Even if this Court were to find Felix’s statements were given voluntarily, despite Felix’s arguments, this Court should find that the DNA submitted was not obtained voluntarily, and that it was obtained in violation of Felix’s rights as found under the Fourth Amendment to the Constitution of the United States and of Article III-6 of the Constitution of West Virginia.

CONCLUSION

Due to the failure of Petitioner to prove that this is the only remedy available to the Petitioner or evidence supporting the Petitioner's position that Respondent's ruling precluded their ability to prosecute Felix, and the failure by Petitioner to prove by a preponderance of the evidence that Cesar Felix's statements were given voluntarily, and that Felix knew what rights he was waiving regarding signing the *DNA Permission to Search* form, the Writ should be denied. Because the Respondent properly found that Felix's Constitutional Rights were violated and because evidence supports the position that such was caused by the failures made in the investigative and interview process by State actor, Det. Trejo, Cesar Felix respectfully requests that this Honorable Court deny Petitioner's Writ of Prohibition, Order that the Respondent's ruling was proper, and any other relief that justice demands.

Respectfully Submitted,

Cesar Felix, Defendant below

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the foregoing CESAR FELIX'S SUMMARY RESPONSE TO WRIT OF PROHIBITION was had this 9th day of October 2020 upon the Petitioner, State of West Virginia by hand delivering, to a designated secretarial official in the employment of Petitioner's Office, a true and correct copy thereof to Stephen Fitz, Esq.

By: _____



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CERTIFICATION

I, Matthew C. Brock, being first duly sworn, do hereby certify that, to the best of my knowledge the contents of this SUMMARY RESPONSE TO WRIT OF PROHIBITION and facts alleged herein are true and accurate to the best of my knowledge.

By:


Matthew C. Brock, Esq. (#11766)

State of West Virginia
County of Monongalia

Taken, subscribed, and sworn before me this, the 8th day of October, 2020.

In witness hereof, I hereunto set my hand and official seal.




Notary Public
My commission expires July 13,
20 21.