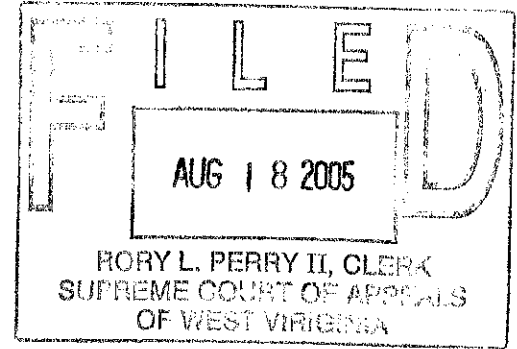


No. 32663

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IN THE  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA



CHARLESTON

STATE OF WEST VIRGINIA,

Plaintiff below, Appellee,

vs.

FRANCIS ANTHONY SANDOR, III,

Defendant below, Appellant.

APPELLANT'S REPLY BRIEF

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## I.

### INTRODUCTION

It is obvious from a review of the parties' briefs, that a fundamental disagreement exists regarding the facts, law and standard of review applicable to the case at bar. Basically, the Appellee places the burden upon the Appellant to request counsel and relieves the Circuit Court from any obligation to ensure that Mr. Sandor either had the assistance of counsel or was knowingly, voluntarily and intelligently waiving his right to same. However, this contention is in direct contradiction to well-established principles of the United States Supreme Court, which are applicable to the states through the Fourteenth Amendment of the Constitution. "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." Carnley v. Cochran, 369 U.S. 506, 516, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962).

Moreover, this Honorable Court has long held that trial courts must take an active, not passive or reactive, role in advising defendants of their right to counsel. This necessitates a dialogue, especially when a defendant, such as the Appellant, appears without counsel. "Accordingly, we hold that in the absence of advice from the court that he was entitled to counsel, retained or appointed, the defendant was denied his constitutional right to effective assistance of counsel." State v. Blosser, 158 W.Va. 164, at 168-169, 207 S.E.2d 186 (1974).

Blosser is particularly instructive since the defendant was appealing his conviction from the Justice of the Peace. This defendant appeared before the circuit court without counsel and represented himself at a jury trial. It is logical that the defendant had been previously advised of his constitutional rights by the lower court, but it is undisputed that the circuit court failed to inquire. The Appellee argues that the second court was not required to inquire especially if a defendant does not assert his right or actually attempts to represent himself.

However, “[f]ailure by the trial court to communicate the right precludes this Court from considering the question of waiver by conduct.” State v. Blosser, 158 W.Va. 164, 169, 207 S.E.2d 186 (1974), (emphasis added). The Appellee correctly asserts that the Circuit Court never questioned why the Appellant appeared without counsel. Instead, in addition to shifting the burden to the Appellant to request counsel, the Appellee argues that his statement and conduct prove a waiver occurred. The Appellant denies that he waived counsel or that his statement and conduct prove that he knowingly, intelligently or voluntarily waived his right to counsel. Instead, the Appellant believes that the record, or lack thereof, supports his contention that a waiver did not occur. Most importantly, the Circuit Court’s failure to discuss the Appellant’s position regarding counsel ends the inquiry and renders his conviction void.

## II.

### STANDARD OF REVIEW

The facts and law in this case are so intertwined that the standards of review proposed by the Appellee are not feasible. (Appellee Br. P. 11-12). “Generally, findings

of fact are reviewed for clear error and conclusions of law are reviewed de novo. However, ostensible findings of fact, which entail the application of law or constitute legal judgments which transcend ordinary factual determinations, must be reviewed de novo." Syl. Pt. 1, State v. McCraine, 214 W.Va. 188, 588 S.E.2d 177 (2003). The Appellee carefully crafts his arguments to urge a multi-step analysis in the hope that this Court will somehow uphold the lower court's ruling.

Toward that end, the Appellee attempts to characterize the lower court's ruling as a finding of fact, but, in reality, it constitutes a legal ruling that waiver occurred. The case law cited by Appellee, with one exception, reveal that some type of colloquy occurred between the defendant and the trial court. Thus, in cases such as State v. Sheppard, 172 W.Va. 656, 310 S.E.2d 173 (1983); State v. Sandler, 175 W.Va. 572, 336 S.E.2d 535 (1985); and State v. Gravely, 176 W.Va. 220, 342 S.E.2d 186 (1986), there is a record from which the trial court made a contemporaneous ruling. In these cases, this Court held that it could review the trial court's dialogue with the defendants, in addition to any other evidence, to ascertain if a defendant clearly and unequivocally waived his right to assistance of counsel in a knowledgeable, intelligent and voluntary manner.

However, the Appellant must prevail regardless of the standard of review, since the record developed by the Circuit Court cannot sustain either a finding of fact or conclusion of law that the Appellant clearly and unequivocally waived his right to counsel in the de novo bench trial. "The federal rule which is now applicable to state courts is set forth in Johnson v. Zerbst, 304 U.S. 458, to the effect that even if an accused does not request the assistance of counsel it is the duty of the court to ascertain if he

understands that he is entitled to one.” State ex rel. Arbraugh v. Boles, 149 W.Va. 193, 139 S.E.2d 370 (1964).

### III.

#### CLARIFIED STATEMENT OF FACTS AND ARGUMENT

The Appellant feels compelled to counter the facts and arguments set forth in the Appellee’s brief. Specifically, the Appellant asserts that the record does not support some of the facts and the corresponding arguments contained therein; the Appellant’s brief is misinterpreted and some of the authority cited needs further examination. Nevertheless, Appellant is mindful that this Court does not simply want to review an edited version of the Appellant’s brief. Nor is it necessary to restate all of the facts and issues contained in the Appellee’s brief, and then counter with the Appellant’s corrections. Therefore, the Appellant will generally categorize the disputed matters and will endeavor to reference the corresponding pages in the Appellee’s brief. Since the facts and law are so interconnected, Appellant has opted to combine both in the following manner:

1. **THE APPELLANT DID NOT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVE HIS RIGHT TO COUNSEL.**

The Appellee contends that the Appellant’s statement at the January 18, 2002 motion hearing was tantamount to disavowing the financial affidavit and alleviated the Circuit Court’s statutory duty to rule on same in accordance with West Virginia Code

§29-21-16(d). (Appellee Br. P. 17). The Appellee inaccurately repeatedly refers to the Appellant's statement in the plural throughout its brief to bolster its claim that the record is replete with waiver and that the Appellant had another reason for filing the financial affidavit. Furthermore, the Appellee ignores the increased need for vigilance when a fundamental constitutional right is at issue and the Circuit Court's role as gatekeeper of the Appellant's constitutional rights.

In reality, the Appellant's statement was not a retraction of his request for counsel. When read in context, the statement demonstrates that the Appellant recalled that he executed two blank documents on November 19, 2001: a criminal bail agreement and criminal appeal bond in addition to the financial affidavit. (January 18, 2002, Tr. P. 9-11). In actuality, the criminal bail agreement:criminal appeal bond is one form. Accordingly, the Appellant completed the financial affidavit and also signed the blank bond form on November 19, 2001. Furthermore, the record reveals that the Appellant was concerned about filing blank documents and whether all of the documents would be reviewed and considered timely filed by the magistrate so that his conviction could be appealed. His statement about a date referred to the timing issue, since there is no requirement that a financial affidavit must be completed to perfect an appeal. There would have been no reason for the magistrate assistant to provide this document except upon request of the Appellant.

At no time did the Appellant refer to himself as a pro se litigant or ever make a statement, and certainly not a clear and unequivocal statement, that he did not want counsel for his de novo appeal. Instead, the Appellant proceeded believing that his request for counsel had been summarily denied, like his motions in magistrate court and

his previous request for reinstatement of counsel in the felony case during a hearing on November 26, 2001. It is interesting that the Appellee, like the Circuit Court, totally ignored the Appellant's statement made during the aforementioned hearing in the felony case. (Appellee Br. P. 17).

One week after completing the financial affidavit at issue, the Appellant requested that the Circuit Court reinstate his previously appointed counsel in his felony case. The Appellant advised the Court that he now knew he needed help examining witnesses since "I basically got run over in magistrate court." (Case No. 01-F-65, November 26, 2001, Tr. P. 31). This statement is highly relevant since it was made before the de novo appeal. On November 26, 2001, the Appellant had no knowledge that counsel would not be appointed for the de novo appeal, the outcome of the misdemeanor appeal or even that this transcript, from an unrelated matter, would ever be transcribed. Instead, this statement was a contemporaneous assessment of the Appellant's experience at magistrate court and demonstrates that the Appellant reevaluated his previous decision and that he did want counsel, both for the case at bar and the felony case. This statement also corroborates the Appellant's Affidavit, which was filed in December 2002, but the transcript was not filed until May 2004.

Accordingly, the Appellee is incorrect when it asserts that there is "substantial, almost irrefutable evidence that it [the financial affidavit] was not completed for the purpose of obtaining counsel." (Appellee Br. P. 18). Furthermore, the record does not support its conclusion that the Circuit Court "obviously considered the testimony offered in the affidavit..." (Id). The August 11, 2004 Order fails to mention the Appellant's Affidavit or that the Circuit Court discredited same. (App. Record P. 277-283). This

Order also never ruled upon, much less, discredited or disavowed, the Appellant's statement made at the November 26, 2001 felony hearing.

Similarly, the Appellee's contention that the Circuit Court incorporated any of the Appellant's memoranda of law into its rulings is not contained in the record. The transcripts do not reflect the Court even received the memoranda, much less that they were read. Also, neither the Judgment Order, entered on January 25, 2002, nor the Order ruling on post-trial motions, entered on August 11, 2004, made any reference thereto.

Similarly, the Petitioner never orally argued for judicial notice of his pro se status as alleged by the Appellee. (Appellee Br. P.22 & 27). Instead, this concept is mentioned in a footnote of a memorandum of law, which probably had also been used in the felony trial. As previously stated, there is no evidence from the record, including the above-referenced Orders, which were prepared by the Court and not by a party, that said memorandum was ever examined.

Instead, the trial court determined a waiver occurred because the Appellant did not specifically request counsel during either the motion hearing or bench trial. Moreover, despite the Appellee's contentions to the contrary, the Circuit Court also based its ruling of waiver upon the Appellant's previous decision to represent himself in the prior felony case. (Appellee Br. P.15). However, as stated hereinabove and in Appellant's brief, the waiver in the felony case was hardly unequivocal and a prior waiver does not preclude the right to counsel in a subsequent case. State ex rel. Kozdron v. Boles, 149 W.Va. 596, 142 S.E.2d 769 (1965).

After misquoting the Appellant's brief (Appellee Br. P. 25, Appellant Br. P. 15-- which is referring to App. Record P. 258-262), the Appellee cites State v. Gravely, 176

W.Va. 220, 342 S.E.2d 186 (1986). The Appellee attempted to cite this case to support its position that no warnings were necessary since the trial court knew the Appellant was familiar with the court system and thus made a knowledgeable decision to represent himself. However, that case is distinguishable for several reasons. First, the defendant in Gravelly had appointed counsel for his first trial and sought leave of the trial court to represent himself after a disagreement with his counsel in his second trial. When the defendant filed a written motion to proceed pro se, the trial court held a hearing and discussed the defendant's right to counsel and its concomitant right of self-representation. Secondly, the defendant stated that he made the decision to proceed pro se "with full knowledge and understanding of...rights and of the risks involved in...self representation." State v. Gravelly, 176 W.Va. 220, 222, 342 S.E.2d 186 (1986).

Additionally, the judge made timely rulings that a waiver occurred, but also ensured that the defendant understood the consequences of his actions by engaging in another dialogue. The trial court made another record the following day, prior to the start of the trial. At the second hearing the defendant again expressed a desire for self-representation. In contrast, in the case at bar, there was no dialogue and the Circuit Court made its ruling that a waiver occurred, not at the time of trial, but nine hundred and thirty-two (932) days later. Lastly, unlike the case at bar, the defendant in Gravelly "unequivocally expressed a desire to represent himself..." Id. at 224. Instead of weakening Appellant's case, Gravelly helps underscore that a valid waiver did not occur in Appellant's case.

**2. THE ONLY REASON THE APPELLANT COMPLETED THE FINANCIAL AFFIDAVIT WAS TO OBTAIN COUNSEL.**

The Circuit Court and the Appellee both attempted to offer various alternative reasons why the Appellant executed a financial affidavit. (June 14, 2002, Tr. P. 40, Appellee Br. P. 14). However, none of the explanations withstand scrutiny. The Circuit Court opined that the Appellant might have filed said document to obtain transcripts or to obtain a waiver of court costs, but neither applied to the Appellant. There were no transcripts from magistrate court and there was no filing fee associated with docketing the de novo appeal. The Appellee improperly alleges that the Appellant executed the financial affidavit to obtain a waiver of bond. A review of the record does not support this contention. In fact, the Appellant initially made bond through a bail bonding company and this bond was continued and forwarded with the file to the Circuit Court, in accordance with the law and custom in Monongalia County. West Virginia Code §62-1C-5 and §62-1C-6. (App. Record, P. 6 & 4, respectively).

The Appellee's additional assertion that the Appellant initialed both the cash and recognizance portions of the criminal appeal bond form is likewise unsubstantiated by the record. (Appellee Br. P.16). An examination of that document reveals that the initials belong to Magistrate Michael L. Roberts, and not the Appellant. (App. Record P. 10-11). Furthermore, the Appellant's bond could not be increased so there was no need to prove indigency in order to be able to perfect his appeal. The Appellant's bond was initially set at Five Hundred (\$500.00) Dollars and could not be increased since that amount represents the highest possible fine for the offense of battery. Rule 20.1(b) of the West

Virginia Rules of Criminal Procedure for Magistrate Courts limits appeal bonds to the maximum fine for the offense at issue. Accordingly, the authority included in the Appellee's brief is inapplicable to Appellant. After the manufactured "reasons" have fallen, the only one left standing is that the Appellant wanted counsel since he "basically got run over in magistrate court." (Case No. 01-F-65, November 26, 2001, Tr. P. 31).

**3. THE CIRCUIT COURT WAS OBLIGATED TO RULE ON THE FINANCIAL AFFIDAVIT.**

The Circuit Court, in addition to its obligation to safeguard the Appellant's constitutional rights, had a mandated statutory obligation to rule on the Appellant's financial affidavit. West Virginia Code §29-21-16(d). This statute states that "[i]n circuits in which no public defender office is in operation [such as Monongalia County], circuit judges shall make all determinations of eligibility." *Id.* This code section is further couched with mandatory language setting parameters for granting or denying the appointment of counsel. The Appellant fulfilled his obligation when he completed the document and returned it to the magistrate assistant. At that point he had no control over the routing of the financial affidavit. The Appellant accepts the Circuit Court's statement that it never received the document in the normal manner. In fact, Appellant's counsel investigated why a ruling was never made and advised the Court that it is likely that the financial affidavit was forwarded with the file and was inadvertently lodged instead of forwarded for the judicial review. (June 14, 2002, Tr. P. 28-30). However, once aware of the financial affidavit, the Circuit Court had an obligation to rule and make a clear record.

As previously stated, the Appellee incorrectly contends that the Appellant's statement at the motion hearing negated the Circuit Court's responsibility to rule on the financial affidavit. (Appellee Br. P.17). In fact, the Appellant never requested that the Court withdraw his affidavit. If the Circuit Court thought that the Appellant was withdrawing his request then it should have inquired and made such a ruling during the hearing or even at the bench trial.

The Appellee also disputes the Appellant's analogy between the filing of the financial affidavit and a motion, such as the one discussed in State v. Head, 198 W.Va. 298, 480 S.E.2d 507 (1996). However, a motion is defined as "[a] written or oral application requesting a court to make a specified ruling or order." Black's Law Dictionary, Seventh Edition. As with other types of motions, an order, either of appointment or denial, is generated from a circuit court's review of a financial affidavit. Additionally, defendants denied counsel may request reconsideration or a hearing with the judge. The filing of a financial affidavit is the statutory mechanism for petitioning courts for relief regarding counsel. Accordingly, it is akin to a motion and required a ruling by the Circuit Court.

Head is applicable for the principle that the Court, not the Appellant, had the duty to rule once the Appellant fulfilled his responsibility by completing and filing the financial affidavit. The Appellee wants to limit this case only to the type of motion contained therein, but the principle is the same if another motion is substituted in the body of the case. Head stands for the proposition that circuit courts cannot evade their responsibility by making findings of waiver or abandonment when the court has failed to rule as mandated by law.

Consequently, if the Circuit Court had fulfilled its duty then a ruling on the waiver issue would have been timely made. As it is, the Circuit Court never ruled on the waiver issue until nine hundred and thirty-two days (932) after the de novo appeal. In reality, a conclusion of waiver after that much time had elapsed, was an attempt to justify the Circuit Court's failure to engage the Appellant in a colloquy regarding his right to counsel and failure to rule on the affidavit, much like this Court found unacceptable in State v. Head.

4. **THE CIRCUIT COURT DID HAVE A DUTY TO ADVISE THE APPELLANT OF HIS RIGHT TO COUNSEL ON THE RECORD.**

Despite the Appellee's contention to the contrary, there is authority that the Circuit Court had an affirmative duty to inquire and advise the Appellant regarding his right to counsel. As previously stated, a silent record is not sufficient to establish waiver. Instead, "[t]he record must show, or there must be an allegation and evidence which show that an accused was offered counsel but intelligently and understandingly rejected the offer." Carnley v. Cochran, 369 U.S. 506, 516, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962). The duty of communicating and ascertaining if the Appellant desired counsel or if he intended to proceed pro se lies with the trial court and not with the Appellant.

"To this end, the trial court is required to conduct, on the record and out of the presence of the jury, an inquiry of the defendant, informing him of his rights and of the possible consequences of self-representation." State v. Sheppard, 172 W.Va. 656, 671, 310 S.E.2d 173 (1983). Furthermore, as stated hereinabove, "[f]ailure by the trial court

to communicate the right precluded this Court from considering the question of waiver by conduct." State v. Blosser, 158 W.Va. 164, at 168-169, 207 S.E.2d 186 (1974).

The cases cited by the Appellee, with one exception, contain a record of a discourse between the trial court and defendants regarding their understanding of their constitutional rights and their voluntary and intelligent decision how to exercise said right or rights. Yet, Appellee argues that the one statement by the Appellant and the fact that he endeavored to represent himself supplants the need for the Circuit Court to question and ascertain which right Appellant is asserting. However the facts and circumstances which courts can correctly consider, set the parameters of the colloquy, but do not negate the need for same. No case cited by the Appellee held that simply because a court was aware of a defendant's age, intelligence, familiarity with the court system etc., obviated the need for a judicial inquiry. The only authority Appellee cited that did not contain a judicial discussion, was State v. Britton, 157 W.Va. 711, 203 S.E.2d 462 (1974). This case is distinguishable since the defendant was able to retain counsel, but then, apparently choose to ignore his attorney's advice, and proceeded to engage the prosecutor in plea negotiations. This Court did not require a colloquy, but clearly the defendant in Britton had access to advice of counsel and elected to proceed pro se, at his own peril. Clearly, the Appellant never had access to counsel, so Britton is really not applicable.

Equal protection must demand that the Appellant be afforded a timely inquiry by the Circuit court. If a trial court must inquire and make a record if a defendant wants to fire his court-appointed counsel, then why should courts be relieved of inquiring if a defendant appears without counsel? Watson v. Black, 161 W.Va. 46, 239 S.E.2d 664 (1977). It makes no sense, and is a denial of equal protection, to relieve trial courts of

the responsibility of ensuring that the Appellant, and those like him who appear without counsel, understand and are making a voluntary and knowing decision regarding their rights. Additionally, when a defendant decides to forego the assistance of his appointed counsel and represent himself; this Court upheld the waiver principally because the trial court held two hearings and during both discussions, the defendant consistently and unequivocally asserted his right of self-representation. State v. Gravely, 176 W.Va. 220, 342 S.E.2d 186 (1986). Waiver cannot be upheld in Appellant's case since there is no clear and unequivocal assertion of the right to proceed pro se. Additionally, the Appellant did not rescind his request for counsel and no colloquy occurred, from which the trial or this Court can ascertain that the Appellant waived his right to assistance of counsel.

5. **THE APPELLANT DID NOT WAIVE HIS RIGHT TO COUNSEL IN THE DE NOVO APPEAL BECAUSE HE OPTED TO REPRESENT HIMSELF IN MAGISTRATE COURT.**

The Appellee would have this Court dispossess defendants of their right to counsel with a brightline rule holding continued waiver. (Appellee Br. P.29). However, the case cited is not applicable since it dealt with utilizing an uncounseled, guilty plea to enhance a subsequent charge. State v. Armstrong, 175 W.Va. 381, 332 S.E.2d 837 (1985), overruled on other grounds by, State v. Hopkins, 192 W.Va. 483, 453 S.E.2d 317 (1994). Even if applicable, the Appellant has met his burden through the filing of his Affidavit and the felony transcript that corroborates his contention that he wanted counsel for his appeal. More importantly, in Armstrong, this Court expressed that "[a]s a

fundamental proposition, a waiver of rights, including the right to counsel, should be reasonably contemporaneous to the taking of the plea." *Id.* P. 387.

This Court held that a one-month lapse between the signing of the rights waiver and entry of the plea was too long. Consequently, "[g]iven the substantial lapse of time between the arrest and eventual plea, and the fact that the appellant appeared before the magistrate without counsel, the magistrate was under a duty to ascertain, and make it clear by written record, that the appellant understood the rights he would be foregoing upon entering a guilty plea and waived them knowingly." *Id.* In the case at bar, the waiver was signed over eight months before the *de novo* appeal occurred. An inquiry by the Circuit Court would not have been unduly burdensome or onerous and was necessary for the reason set forth in Armstrong. Moreover, felony defendants are subject to receiving instruction regarding their constitutional rights at least twice (at magistrate court and during circuit court arraignments). Also, said defendants are apprised a third time if a guilty or *nolo contendere* plea is tendered for the trial court's consideration. Case law dictates, not a continued waiver, but that an inquiry is made to ensure defendants are afforded their constitutional rights, especially fundamental ones.

Next, the Appellee contends that the waiver should be continuous, like that of waiving a jury trial in magistrate court, citing State ex rel. Ring v. Boober, 200 W.Va. 66, 488 S.E.2d 66 (1997). (Appellee Br. P. 30). However, the waiver of a jury trial is not absolute and this Court has subsequently held that, a hearing on the issue is required, in appropriate circumstances, when the defendant does not initially timely assert this right. State ex rel. Callahan v. Santucci, 210 W.Va. 483, 557 S.E.2d 890 (2001). Again, this Court recognized the heightened scrutiny needed to assure that an improper waiver of a

fundamental constitutional right does not occur. Therefore, magistrate courts are required to hold a hearing... "so as to permit the creation of an adequate record bearing upon whether the untimely demand resulted from an intentional, knowing and voluntary waiver of such right by the defendant." partial Syl. Pt. 7, Id.

In reality, the Appellee is urging this Court to revert to the days when waiver was presumed and trial courts had little responsibility in ensuring defendants received their fundamental constitutional rights. Earlier cases in West Virginia held that "waiver will be presumed from the failure to request counsel, a silent record as to request for counsel, or the entry of a guilty plea." State ex rel. May v. Boles, 149 W.Va. 155, 161, 139 S.E.2d 177 (1964), other citations omitted. However, in 1964, this Court no longer could tolerate such presumptive waiver and overturned these cases. "[W]e feel constrained to hold that a state conviction cannot stand when founded on a guilty plea by a defendant unsure of his right to counsel or on a record silent as to the matter of assistance of counsel." Id. At 161-162. The same principle applies if a defendant pleads not guilty.

The wisdom of this decision has withstood the test of time. The trial courts have the duty to ensure that the record is not silent regarding fundamental constitutional rights. Simply stated, the trial court has the duty to give voice to the silent record. If that does not occur, then convictions cannot stand.


#### IV.

#### PRAYER FOR RELIEF

The Appellant reiterates and incorporates, by reference; his previously filed prayer for relief. It is difficult to request relief since his sentence has been served.

Nevertheless, the Appellant's arguments still deserve consideration and his rights deserve vindication. Accordingly, the Appellant prays that his conviction be overturned and for such other relief that this Court can accord.

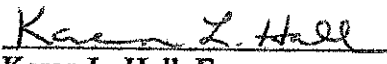
Respectfully submitted,  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the foregoing APPELLANT'S REPLY BRIEF was served upon Managing Deputy Attorney General, Barbara H. Allen, at her office at the address listed below, by placing same, postage pre-paid, in the United States mail on this the 16<sup>th</sup> day of August, 2005:

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