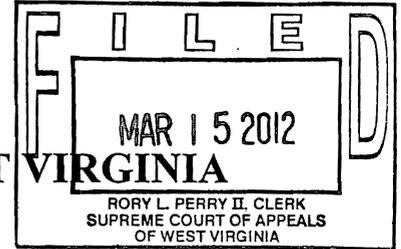


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



DOCKET No. 11-1504

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

VS.

JACK JONES,

Defendant Below, Petitioner.

Appeal from a final order  
of the Circuit Court of Ohio  
County (08-F-13)

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**PETITIONER'S BRIEF**

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### **III. ASSIGNMENTS OF ERROR**

1. The State of West Virginia (“state”) relied upon the testimony of the complaining witness, R.M.; expert opinions regarding psychological symptoms exhibited by child victims of sexual abuse; and medical opinions regarding symptoms alleged to be consistent with sexual abuse as proof of the charged sexual misconduct. After giving timely and appropriate notice, the defense attempted to introduce into evidence numerous allegations by the complaining witness regarding alleged instances of alleged sexual abuse by persons other than the Petitioner to refute the opinion of the state’s experts by demonstrating that the symptoms relied upon by the such experts could be attributed to abuse by persons other than the Petitioner. In the alternative, the defense attempted to introduce into evidence the numerous allegations by R.M. against people other than the Petitioner as false reports. The trial court erred by prohibiting use of such evidence on the grounds that the defense failed to establish that the reports were either true or false.

2. The state failed to provide discovery of meaningful and exculpatory evidence critical to the presentation of a defense as well as to confrontation of the state’s witnesses. On or about September 14, 2009, the West Virginia Department of Health and Human Resources (“department”) generated a report regarding allegations of sexual abuse by the complaining witness against her respite foster care provider, John Graham. The allegations were determined to be false based upon an interview of an eyewitness and a recantation by R.M. The report indicated that R.M. had falsely reported that she had been sexually abused by various unidentified men on at least three (3) occasions and falsely reported that she had been sexually abused by Patrick Keefer, a “grandfather,” and a principal. Despite numerous requests from the defense, the state failed to provide the identity as to the author and/or the source(s) of the report.

3. An expert called by the state improperly testified that it was her opinion that the complaining witness had been sexually abused by Petitioner, Jack Jones. Defense counsel promptly and appropriately objected and sought a mistrial, which the trial court denied.

4. Counsel for the state vouched for the credibility of its evidence during closing arguments. During the initial closing statement, counsel for the state claimed that it presented honest evidence from honest witnesses. During rebuttal closing, counsel for the state claimed that she had been taught in law school to put a spin on the evidence, but that she refused to do so; thus, suggesting to the jury manipulative tactics on part of the defense. Counsel for the Petitioner did not object during closing arguments for fear that it might draw the attention of the jury to the comments in question, which would have served to only heighten the prejudice caused by the expert witness, Maureen Runyan, who had previously expressed an opinion, wholly prohibited by law, that the Petitioner, Jack Jones, had sexually abused the child, R.M. The Petitioner did raise said matter in post-trial motions.

#### IV. STATEMENT OF CASE

R.M.<sup>1</sup> was born to Jessica Jane M.<sup>2</sup> on December 27, 1998. During her life, she and her mother lived at various residences in Ohio County, West Virginia, as well as Belmont County, Ohio. (A.R. 1 – 2, 4 – 8, 15, 18, 28, 38, 39, 72). As early as 2001, the child’s mother became involved in and on-again/off-again relationship with the Petitioner, Jack Jones. (A.R. 23 – 25).

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<sup>1</sup> In accord with the manner in which the subject indictment framed the name of the victim, consistent with general guidance from this Court, *see, e.g., State v. King*, fn. 1, 183 W.Va. 440, 396 S.E.2d 402 (1990) (footnote omitted), and mindful of the fact that the instant Petition is a publicly filed document, the Petitioner has utilized only her initials in this document. The child’s full name is reflected in the trial transcript.

<sup>2</sup> Inasmuch as R.M.’s mother was Petitioner’s co-defendant in companion criminal proceedings, which previously came before this Court in *State v. Jessica Jane M.*, 226 W.Va. 242, 700 S.E.2d 302 (2010), and given the fact that the Court was of the opinion that use of her last name would make the child more easily identifiable, the Petitioner, in line with the same, will continue to utilize only the mother’s first name and last initial.

The child's first reported claim of sexual abuse came on July 18, 2001, when R.M., just under three (3) years of age, alleged to her pediatrician that her four (4) year old relative, Sasha, "touched" her "private area." At that time, the pediatrician noted "no obvious evidence of genital trauma." (A.R. 9).

Thereafter, on March 5, 2003, the child presented, along with her mother and aunt, at the emergency room of Wheeling Hospital, alleging she had been sexually assaulted by the Petitioner, Jack Jones, occurring as early as March, 2002. (A.R. 50). During the investigation of the alleged incident(s) by various parties, including the child's mother, the child would tell her mother, after initially saying that Jack Jones had assaulted her, that he did not do it, and that it was her Uncle, Calip M., IV, that actually assaulted her. (A.R. 45 – 47). The child's mother found it noteworthy, during her own investigation of the matter, that the child had accidentally viewed a "porno" film which had been left in the video cassette recorder ("VCR") just days before she reported incidents of sexual misconduct. Id.

The department, during its investigation of the alleged incident(s), also noted that, both, the child's mother and the Petitioner reported R.M. seeing a "porn movie" in and around the time of her disclosure. Moreover, the department learned that the child not only accused the Petitioner and her uncle, Calip M., IV, but that she also accused her paternal grandfather, Calip M., III. (A.R. 66). Not only that, but the child also indicated that the alleged incident(s) may have been the product of a dream. Id.

While the department determined there may have been a "risk of maltreatment" in the child's home, it found no maltreatment had occurred at that time. Id. The Ohio County Sheriff's Department, who worked closely with the department in investigating the matter, appears to have

agreed, given that no charges came out of their offices; not against the Petitioner, the girl's uncle, or the grandfather. (A.R. 59).

Some two-and-a-half (2½) years later, between the months of October through December, 2005, the department was once again involved in the child's life. This time the investigation was for various reasons, including charges of sexual assault.

Beginning in October, 2005, the department received a referral, alleging R.M.'s mother, Jessica M., was addicted to crack-cocaine, was "high most of the time," and that there was no food in the home because Jessica M. was alleged to have sold her food stamps. (A.R. 80). On or about December 4, 2005, the Petitioner, Jack Jones, called the department, "upset," claiming Jessica had left R.M. and her younger siblings home alone, with no food. (A.R. 85). During the department's investigation of the matter, the Petitioner claimed that Jessica M. was "high" on crack-cocaine for "days at a time." Id.

On December 19, 2005, less than two (2) weeks after Jessica M. left her children home alone, the department investigated a new referral involving sexual misconduct on the part of the Petitioner; this time against M.M., R.M.'s younger sister. (A.R. 92). On that date, a department worker, Carolyn Christian, went to Jessica M.'s home to "address the information in the referral"<sup>3</sup> which included a claim that the Petitioner taught M.M. "how to kiss her cochi." Id. On December 20, 2005, R.M. and M.M. were taken to Harmony House for the purpose of conducting a forensic interview. M.M. made no disclosure, while R.M. stated that the Petitioner "pinched" her private area when he after chasing her up the stairs carried her down the same stairs. Id. As before, sexual abuse was not substantiated. Id.

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<sup>3</sup> Suggesting that Jessica Jane M. made the referral; just as it could be suggested that the Petitioner made referrals against her, including those repeated claims that she was addicted to crack-cocaine.

Two months later, on February 24, 2006, the Circuit Court of Ohio County, West Virginia issued an Order granting the department emergency custody of Jessica M.'s three (3) children, insomuch as Jessica M. appeared to be "under the influence of an illegal substance which cause her to leave the two (2) year infant child standing on the street . . ." (A.R. 98). In the days following, the department filed a "Petition for Relief from Parental Neglect and Abuse" against Jessica M. as well as against the Petitioner, Jack Jones. (A.R. 100).

From, at least, June, 2006, through August, 2006, the West Virginia Youth Advocate Program ("YAP") staff supervised Jessica M.'s visit with her children, which, initially, occurred at the YAP office in Parkersburg, and, then, at Jessica M.'s residence in Ohio County, West Virginia. (A.R. 108 – 115). During these visits, it was noted, the children were "very happy" to see their mother and "tearful" when they left her. Id. It was also noted, "mom was appropriate." (A.R. 112 – 115).

On August 3, 2006, a multidisciplinary team ("MDT") meeting was held with regard to the underlying civil neglect and abuse case. During that meeting, there was discussion of the children "being moved to another home," which was based upon "things going on in the foster home." (A.R. 116).

On October 3, 2006, another MDT was held with respect to the civil neglect and abuse case. At that time, there was discussion of Jessica M. arranging her schedule in order "to accommodate overnight visitations [with her children] every other weekend." (A.R. 117). The members also discussed reunification of mother and children. Id. It was decided to have another MDT meeting on November 8, 2006, at which time they would determine whether "the kids can come to their next visit to stay." Id.

In and around this time, as reported, the children's foster mother, Sally Keefer, began to keep a journal of bizarre conduct and statements allegedly made by R.M. According to Ms. Keefer's journal, beginning September 21, 2006, she "caught" R.M. "french kissing" her little brother, I.N.M. She noted the same behavior on October 18, 2006. Five (5) days later, on October 25, 2006, Ms. Keefer noted that the child remarked "ice cream tasted like beer," and went on to say, during parties at her mother's house, the Petitioner would hold her down while Jessica M. "poured beer down my mouth . . . ." Not long after making that statement, on November 4, 2006, Ms. Keefer noted that R.M. approached her in the living room to tell her that she had previously "lied" to "a woman" who had "asked her if she had ever seen a man naked or her mom;"<sup>4</sup> that she "lied and said no." This, then, led to R.M. telling Ms. Keefer that, while living with her mother, she walked into her mother's bedroom and saw her mother, Jessica M., and the Petitioner, Jack Jones, naked. She went on to say that, on occasion, her mother "had her watch them do it a few times." According to Ms. Keefer's journal, R.M. said that she saw the Petitioner, Jessica M., a person named David Bird, as well as a person named William, naked. (A.R. 118 – 119).

At the conclusion of the November 4, 2006, conversation between R.M. and her foster mother, Sally Keefer, it was suggested that, both, Jessica M. and the Petitioner did something "wrong" to the child. Id.

On November 7, 2006, R.M. presented to staff at Charleston Women and Children's Hospital for the purposes of a physical exam and forensic interview. While the results of the physical exam were noted to be "abnormal," the child, while disclosing "drug use and violence in the home . . .," she "did not give . . . any direct statements of sexual abuse. . . ." (A.R. 124).

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<sup>4</sup> Upon a thorough review of the record, as previously provided by the Respondent in this matter, there is no reference to any female, including Linda Reeves with the Sexual Assault Help Center, or Leslie Vassilaros, from Harmony House, ever asking the child whether she saw her mother or a male in the nude.

Despite there being no disclosure of sexual abuse to healthcare professionals on November 7, 2006, Sally Keefer notes that on November 10, 2006, while bathing, R.M. claimed a shampoo bottle went up inside of her body, at which point there was a non-direct disclosure of being “hurt” by sexual abuse. (A.R. 150 – 151).

By the end of November, 2006, according to R.M.’s foster mother, the child disclosed various acts of alleged sexual misconduct by the Petitioner. In an e-mail sent to the department worker on November 28, 2006, Ms. Keefer declared that on Wednesday, November 22, 2006, R.M. said that R.M. thought the Petitioner, Jack Jones, had put a “stick with splinters or spikes on it” into her vagina and anus. She indicated that the Petitioner used to his penis to penetrate her sex organs as well. She said Mr. Jones had done this since she was “about 3 years old.” (A.R. 152 – 153).

During this conversation, according to Ms. Keefer, R.M. also implicated Jessica M. as an accomplice to the Petitioner, as well as perpetrator of sexual abuse on R.M. Id.

According to Ms. Keefer, the child also disclosed that David Birch touched her “privates.” Id.

Looking to November 28, 2006, the date of Ms. Keefer’s e-mail to the department worker, that was also the day R.M. completed her psychological evaluation with psychologist Sara Wyer. Dr. Wyer had interviewed the child on three (3) separate occasions; November 28, 2006 being the last. This was also the first and only time, of those three (3) days, that R.M. disclosed sexual abuse by the Petitioner, as well as implicating her mother, Jessica M., in such conduct. (A.R. 157 – 158). During prior interviews<sup>5</sup> with Dr. Wyer, R.M. spoke in positive terms of both her mother and of the Petitioner, including fantasies wherein she is able to get them

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<sup>5</sup> The child’s second interview took place on November 22, 2006, which, as noted, is the date on which Ms. Keefer said R.M. implicated her mother in the disclosure of sexual abuse.

“back together.” (A.R. 4). At various times, the child indicated a want and desire to be reunified with her mother. Id.

During her time with Dr. Wyer, R.M. would also tell of how “she once saw a movie about a girl ‘licking a boy’s private parts in the pool’” and how she saw this on a motel television while “everybody else was asleep.” (A.R. 158).

As R.M. continued to reside with her foster parents, the Keefers, more disclosures came about; particularly, those involving Jessica M. According to Sally Keefer’s journal of “Sunday, December 3,” R.M. stated that her mother touched her “kouchy with her fingers.” She also indicated that Jessica M. undertook such conduct “before she met [the Petitioner] Jack.” (A.R. 165 – 169).

On December 20, 2006, most-likely prompted by the various disclosures made to the foster mother as well as Dr. Wyer, the department worker Michelle Hogan went to R.M.’s school to interview the child. During that interview, the child disclosed being sexually abused by, both, her mother and the Petitioner. (A.R. 170 – 184). Contrary to what the child had allegedly said previously, though, she did not say that David Birch or William sexually abused her, even when directly asked by Ms. Hogan. (A.R. 179 – 181).

As part of her treatment, R.M. treated with Barbara Swartz, M.A. of Solutions Outpatient Services, Inc. During a session on May 7, 2007, Dr. Swartz queried R.M. about her claim that she saw a former foster parent, “Wesley” naked. According to Dr. Swartz, the child denied saying she saw Wesley naked, declaring “Arianna said she saw Wesley naked, and he was hot, she should be moved.” (A.R. 185). A month later, on June 4, 2007, during a session with Dr. Swartz, the child was heard to remark “that the devil gets inside of her and makes her do evil things.” Id.

On June 14, 2007, Sally Keefer reported, in addition to the Petitioner and the child's mother, that R.M. named "William" and "David" as persons who "touched" her. During this exchange, R.M. remembered, yet, another person who touched her. While she could not recall the name of the person, R.M. spoke of a man, who was a friend of her mother while she was estranged from the Petitioner, Jack Jones, whose house she traveled to, and where she fell victim to sexual abuse. She referenced the fact that this man had a son the same age as her younger sister, who was also present. According to Ms. Keefer's notes, R.M. said that her mother held her down while this man "did it." The child also indicated this happened on more than one (1) occasion. (A.R. 186 – 190).

On September 16, 2007, the Petitioner was arrested and charged in the Magistrate Court of Ohio County, West Virginia, for (16) counts of "sexual abuse by parent, guardian or custodian," relating to the matter *sub judice*. (A.R. 191). Just under four (4) months later, on January 14, 2008, the Petitioner was indicted by the Ohio County grand jury. (A.R. 193). On January 24, 2008, during arraignment, the Defendant made a routine request for discovery materials under Rule 16 of the West Virginia Rules of Criminal Procedure. (A.R. 207). Additionally, the Defendant moved the circuit court to require the state to disclose and/or produce abuse and neglect records, including department records, as well as psychological, medical, school and counseling records relative and relevant to the child, R.M. The state tendered its initial response to discovery that day. Id.

On March 28, 2008, R.M. was admitted to Pomegranate Health Systems in Byesville, Ohio ("Pomegranate"). According to reports generated by the facility, "she was starting to confuse her history with her present [foster] family, having dreams that this family would be doing similar acts to her as her family of origin and her mother's significant other." (A.R. 222).

The child arrived at Pomegranate from Helinski Shelter, after her foster parents, Patrick and Sally Keefer, requested her removal from their home on or about March 25, 2008. (A.R. 275). The child's "placement [was] disrupted when . . . [R.M.] began to fantasize that her foster parents were going to have sexual intercourse in front of her and then involve her in the act." (A.R. 282). The child "also began to have sexual dreams where her foster mother was having sex with numerous men." (A.R. 275, 282). R.M. became increasingly aggressive while in the Keefers' home, which escalated to the point of property destruction within the home which ultimately led to the child being placed at Pomegranate. Id.

As reported to Pomegranate staff by Ms. Keefer, approximately two (2) weeks prior to R.M.'s removal from the home, R.M. had been having "bizarre dreams, thoughts, and behaviors." (A.R. 270). According to Ms. Keefer, she and her husband were sitting on the living room couch, next to each other, with R.M. present in the room. R.M. "began to get very nervous and anxious that the Keefers were going to have sex and make her watch/participate." Id. Some time thereafter, R.M. went to school and "told school personnel that she had seen Mr. Keefer in his underwear." Id. The school informed Mrs. Keefer, who vehemently denied any such occurrence in her home. Id.

While placed at Pomegranate, staff noted "clear evidence of antisocial behavior including but not limited to lying, stealing, manipulating others, sexual aggression, violence towards people, property, or animals." (A.R. 290). The child, further, disclosed, "while living in . . . the home of her biological mother [Jessica M.], she sexually assaulted an infant, male cousin by inserting a coat hanger into his penis." (A.R. 297).

In terms of disclosures, R.M. continued to accuse her mother, Jessica M., and the Petitioner of sexual abuse. (A.R. 222 – 237). She also “recalls a man named David Perch<sup>6</sup> . . . [who] caused sexual, physical, and emotional abuse.” (A.R. 225). Aside from Mr. Birch, the child seemed to indicate that she was abused by various adults who were friends with or “partied with” her mother. *Id.*

While at Pomegranate, R.M. also disclosed having sex with her cousin Cole under her brother’s crib. (A.R. 243).

By pre-trial hearing held April 21, 2008, the parties having advised the trial court that “discovery” was still outstanding, said court did grant the Petitioner’s motion to continue the trial date. All parties were ordered to return on May 22, 2008, to receive a new trial date. (A.R. 328; A.R., Vol. II, 1 – 11).

On June 13, 2008, still without necessary “discovery” materials to adequately prepare for trial, the Petitioner moved the trial court to compel the state to produce all such materials. (A.R. 326).

By July 11, 2008, still having not received all discoverable materials previously ordered by the trial court and requested by the Petitioner at arraignment and thereafter, the Petitioner was forced, yet again, to move for a continuance of his trial date. (A.R. 332). That same day, the Defendant filed his second motion to compel the state to produce the required materials. (A.R. 330).

By pre-trial hearing held July 22, 2008, the Order thereto entered on July 25, 2008, the trial court ordered the state to issue a subpoena duces tecum upon the department, requiring the agency “to deliver numerous records of the minors implicated in the indictment . . .” (A.R. 335).

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<sup>6</sup> This is most likely a reference to David Birch, who is referenced in various other reports.

On August 19, 2008, the Defendant moved the trial court for a third time to compel the state to produce discovery. (A.R. 337). On September 30, 2008, the Petitioner, yet again, moved the trial court to compel full disclosure by the state. (A.R. 339).

On December 10, 2008, the trial court granted the Petitioner's prior requests for transcripts relating to his co-defendant's trial. (A.R. 353).

On February 13, 2009, the state moved to dismiss counts Fifteen through Twenty-One of the underlying indictment relating to M.M. (A.R. 355). By Order entered the March 16, 2009, the lower court granted the same. (A.R. 360).

Following a mistrial, the matter returned before the trial court on August 13, 2009. At that time, the lower court sua sponte moved the trial date to September 21, 2009. (A.R., Vol. II, 190 – 207).

On August 19, 2009, the department began to generate a report relating to an investigation of alleged sexual abuse perpetrated upon the state's chief complaining witness, R.M., and which referenced a respite foster parent and at least three (3) other people as the culprit, or culprits, and, as it appears from said report, the child, on separate occasions, accused each person of sexual misconduct. (A.R. 373 – 380). The Petitioner's counsel received a copy of this report, via facsimile, on September 15, 2009.

According to this report, R.M. falsely reported being sexually abused by a respite foster care provider, John Graham. During the course of the department's investigation, R.M. admitted the accusation to be false, claiming it was a ploy to get back to into her foster mother's care. (A.R. 374, 378).

Additionally, pursuant to what was contained in the report, R.M. allegedly reported falsely that she had been sexually abused by various men on at least three (3) occasions. (A.R.

376, 378). Said accusations may or may not have been in addition to reportedly false accusations made by the child in regards to her foster father, Patrick Keefer, a grandfather and a principal. (A.R. 377).

Based upon this new, potentially exculpatory material, which included recent recorded forensic interviews of the child witness as well as unknown and unidentified alleged assailants, not to mention department employees and other personnel, the Petitioner, on September 18, 2009, moved for a continuance of his trial date. (A.R. 386).

On November 30, 2009, the Petitioner filed a “Barbe Notice and/or Quinn Notice<sup>7</sup>,” which spoke to the defense’s intent to introduce evidence of other sexual behavior/activities of the complaining witness, R.M., at trial. (A.R. 402 – 406).

Included within the evidence defense counsel sought to introduce was the department’s report, referenced ante, wherein it was said that the child accused her respite foster parent, John Graham, and, at least, three other people of sexually abusing her. Id.

The defense presented and/or cited various pieces of documentary evidence, which suggested, either, the child had fabricated the accusations against the Petitioner; or, conversely, provided an alternative explanation of the etiology of the physical and/or psychological symptoms allegedly exhibited by R.M., or an alternate sources for the age inappropriate sexual knowledge and/or behaviors allegedly exhibited by R.M. (See id.). The trial court only permitted the admission of evidence relating to the child falsely reporting sexual abuse by John Graham. (A.R. 424 – 438).

It should be noted, that while the trial court, for a brief moment in time, granted the Petitioner permission to present false allegation evidence against John Graham under this Court’s decision in State v. Quinn, 200 W.Va. 432, 490 S.E.2d 34 (1997), the defense continued to press

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<sup>7</sup> This was the second such notice expanding on the notice served on the State on September 17, 2009.

the state, beginning on September 15, 2009, upon receipt of the department's report, to disclose more information regarding the same, including the name and address of the person who created the document. (A.R., Vol. II, 573 – 574).

In the department's September 14, 2009 report, various statements appear to be attributed to R.M.'s foster mother, Sally Keefer. (A.R. 373 – 380). During an interview, Sally Keefer denied that she ever made such statements. (A.R., Vol. II, 564).

Obviously, the author could speak to its contents, including things said or not said by Ms. Keefer; nevertheless, the state never provided the defense with that person's name. (A.R., Vol. II, 564, 581). Consequently, the Petitioner was unable to<sup>8</sup> call this never identified person as a witness to testify at a Quinn hearing. (A.R., Vol. II, 573 – 574).

As alluded to above, in the days before trial in this matter was to begin, R.M. recanted her recantation of sexual abuse by John Graham and again declared that she had been sexually abused by John Graham, resulting in the matter, as well as the trial court's prior Order on the matter, being revisited. (A.R., Vol. II, 562 – 564, 568 – 569, 577 – 579).

Trial in this matter began on the morning of December 14, 2009. *Voir dire* was conducted and a jury empanelled. The parties proceeded to give opening statements, and, thereafter, the state called in its case-in-chief various witnesses, including but not limited to the complainant, R.M.

During the trial, the jury heard from Dr. Joan Phillips, M.D., an expert witness for the state, who had performed a pelvic examination on R.M. and came to the conclusion that the child had a tear in her hymen at 6:00 o'clock that was the result of blunt force trauma. It was her

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<sup>8</sup> The Defendant issued a Jane Doe subpoena upon the department in order to procure the attendance of this person. Trial Tr. December 16, 2009 at p. 26.

opinion that the tear was consistent with penile penetration of the vagina. (A.R., Vol. II, 487 – 489).

At the close of the second day of trial, December 15, 2009, the state called Maureen Runyon, a mental health expert employed by Women’s and Children’s Hospital, who was qualified as an expert. (A.R., Vol. II, 511 – 514).

As expected, Ms. Runyon testified to the effect that R.M. exhibited symptoms of children who had been victims of sexual assault. (A.R., Vol. II, 520 – 524, 551 – 552). As expected, Ms. Runyon testified that R.M. had been sexually assaulted. (A.R., Vol. II, 551 – 552). Much to the surprise of the defense, however, Ms. Runyon testified that, in her opinion, the Petitioner, Jack Jones, sexually assaulted R.M. This came about by way of a question that risked such a response. *Id.*<sup>9</sup>

The Petitioner promptly objected and requested a mistrial arguing that a curative instruction would not be sufficient for the reason that the case was built on the testimony of R.M., that the opinion improperly bolstered the testimony of R.M., and that the delivery of the opinion was of such a decisive nature that it carried great persuasive weight. (A.R., Vol. II, 553 – 557). After considering and researching the matter at some length, the trial court denied the request for a mistrial, ordered the testimony stricken from the record, and gave the following curative instruction which was drafted by the Petitioner:

The Court instructs the jury that the testimony of Maureen Runyon in which she expressed an opinion that Jack Jones sexually abused . . . [R.M.] was completely inappropriate and is not a proper opinion within the area of her expertise. No witness is permitted to express a belief or an opinion that a defendant committed any charged offense for the determination of guilt or innocence is solely a matter to be decided upon by the jury. The jury is instructed that the Court has stricken the matter from the record and that the jury may draw no inferences from that testimony and may not consider that testimony in any way in arriving at a

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<sup>9</sup> While the record articulates the actual statement, it should be noted that the testimony at issue came after a pause in Ms. Runyon’s delivery and appeared to be calculated and considered.

conclusion of guilt or of innocence. As a matter of law, that testimony does not exist.

(A.R., Vol. II, 628 – 629).

As referenced earlier, and beginning the third day of the trial, December 16, 2009, the trial court revisited the “Graham” issue, which related to the Petitioner’s ability to introduce evidence under the Quinn decision. (A.R., Vol. II, 562 – 587). During in-camera proceedings, held in the presiding judge’s chambers, the trial court spoke with R.M., as well as another child, H.G.,<sup>10</sup> who was witness to the events at issue. (A.R., Vol. II, 588 – 597). As summarized by the lower court:

[R.M.]’s story is that they were at this pig roast, They spent the night. She and . . . [H.G.] were in the same room. They were sleeping on what she described as a daybed. I can’t recall if she said she was on the top part or the bottom part, but it was like a trundle thing. . . . In any event, she said that her and . . . [H.G.] were in the same room, separate beds, one on top, one on the bottom, that Mr. Graham came into the room at . . . [H.G.]’s request, I believe, because she wanted him there until she fell asleep. Mr. Graham, first she said, was sitting on a couch, what – she was describing the daybed, but she said he was ultimately laying down in the bed. I asked her who bed he was laying in. She said basically both, of and on, at some point. At different points in the evening, he was in bad [sic] with . . . [H.G.], in bed with her. She said that he did indeed put his hand on her. I asked if it – what she meant by that, where, and she said my privates. I asked if that meant the top privates, bottom privates, and I believe she said bottom privates. I asked if it was on top of her clothes or under her cloth[e]s [sic]. She said it was under her clothes. . . . [R.M.] did indeed state that he touched her inappropriately, my word being inappropriately, under her clothing. Asked if she was telling me the truth and she said that she was. She said that she denied it because she was afraid, didn’t think anyone would believe her, but she said today she’s telling me as of today that is what happened.

(A.R., Vol. II 608 – 609). With regard to H.G., the circuit court summarized her retelling of events as follows:

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<sup>10</sup> Inasmuch as this witness was a child, in and around the age of the complainant, R.M., and while also mindful of the subject matter of the proceedings, which are public record, Petitioner’s counsel affords this child the same anonymity as other witnesses involved in these proceedings, and simply refers to this person by initials. Of course, the child’s full name is reflected in the trial transcript.

Her story was very similar to . . . [R.M.]’s to a point. Similar in the sense that they were in – they were at the Grahams. They were at the pig roast. They were in the same room to sleep. They were on a daybed. One was on top, the other was on the bottom, that Mr. Graham came into the room and was asked to stay there until they fell asleep. She denies that he touched . . . [R.M.]. She said that – I think her basis for that is because he was laying in between us and he fell asleep first and was sleeping with his – I guess sleeping on his back, look straight up. I asked her who fell asleep first, her or . . . [R.M.]. She believes . . . [R.M.] fell asleep first. She denies that he put his hands on her. He did anything to her. She say that he was laying in the bed with one or both of them, but denies any touching that he did to her and disputes any touching that he did to [R.M.].

(A.R., Vol. II, 609 – 610). The trial court concluded by saying “both were pretty convincing with that part of the story. One says it happened and other says it didn’t.” (A.R., Vol. II, 610).

After taking a brief recess to consider, or reconsider, the matter, the trial court issued its ruling, denying the Petitioner his ability to present evidence relating to those incidents, involving R.M., which occurred at John Graham’s residence, for the reason that it was precluded under Code 61-8B-11, i.e., the “Rape Shield Statute,” and, in reference to the Quinn decision, there was not “strong or substantial proof that it’s actually false.” A.R., Vol. II, 620 – 621).

On the close of the third day of trial, the complainant, R.M., testified. (A.R., Vol. II, 654 – 680). While on the witness stand, R.M. testified that, on one occasion, they, meaning Jack Jones and Jessica M., called her “upstairs” and while Jessica M. held her down, the Petitioner stuck his penis into her vagina. (A.R., Vol. II, 661 – 662). She testified that the Petitioner “licked,” “kissed,” and, on one occasion, used a “FedEx thing” on and/or in her “private.” (A.R., Vol. II, 662 – 663). She also testified that he made her “kiss” and “lick” his “private.” (A.R., Vol. II, 663).

During the state’s direct examination, R.M. testified that the Petitioner “stuck a stick” in her “butt.” Id. She also testified that he used his fingers and stuck them in her “private,” including her vagina and anus. (A.R., Vol. II, 666 – 667).

Following the testimony of R.M., the state rested.

Proceeding forward, the Petitioner called various witnesses, including two (2) experts, to speak to the sufficiency of the state's evidence. Thereafter, the Petitioner rested. (A.R., Vol. II, 683 – 923).

The court charged the jury relative to the, now, fourteen (14) count indictment and, then, the parties gave closing arguments. (A.R., Vol. II, 933 – 969).

During the course of the state's initial closing argument, Assistant Prosecuting Attorney, Gail W. Kahle, stated that the State had presented "an honest case with honest witnesses." (A.R., Vol. II, 982). Later, during the state's rebuttal, Assistant Prosecuting Attorney, Jenna Wood, stated that she had been taught in law school to put a "spin" on evidence to help her case but that she refused to do so. (A.R., Vol. II, 1014 – 1015).

The jury retired to deliberate. After some time, they returned a verdict of "guilty" as to all offenses charged; that is, six (6) counts of "Sexual Assault in the First Degree," seven (7) counts of "Sexual Abuse by a Custodian or Parent," and one (1) count of "Conspiracy." (A.R., Vol. II, 1029 – 1031).

Following brief argument on the defense's post-trial motions, on July 2, 2010, the lower court, after denying the same, sentenced the Petitioner to: not less than fifteen (15) nor more than thirty-five (35) years as to Counts One, Two, Three, Four, Five and Six; to not less than ten (10) nor more than twenty (20) years as to Counts Seven, Eight, Nine, Ten, Eleven, Twelve and Thirteen; and, finally, not less than one nor more than five (5) years as to Count Fourteen. It was the order of the trial court that all sentences imposed thereto run consecutive to one another for a net effective sentence of not less than One Hundred Sixty-One (161) years nor more than Three Hundred Fifty-Five (355) years in the penitentiary. (A.R., Vol. II, 1073 – 1093).

The Petitioner timely filed a “Notice of Intent to Appeal.” (A.R. 528). On September 30, 2011, the circuit court entered an Agreed Resentencing Order. (A.R. 531). On October 31, 2011, the Petitioner’s counsel filed a “Notice of Appeal.” Thereafter, on January 13, 2012, appellate counsel moved the Court for an Order extending the time within which to perfect a petition for appeal. By “Amended Scheduling Order,” entered in this matter, the Court did grant such a request.

The Petitioner now tenders unto the Court his Petition for Appeal.

#### V. SUMMARY OF ARGUMENT

In the American system of criminal justice an accused is presumed to be innocent no matter how repugnant the charges. From this concept flows the requirement that the state prove a defendant guilty beyond a reasonable doubt through a process mandating due process of law and requiring that a conviction be based on competent evidence rather than upon the belief of the state or of any witness. The concept also results in the requirement that a defendant having a right to present a meaningful defense.

The combination of issues in the case at bar resulted in the Petitioner being denied the ability to present a meaningful defense. Although the mountains of paper generated may give the appearance of an observation of every nicety of criminal law and procedure, the net effect of the errors complained of is an elimination of the ability of the defense to present the heart of the defense to the jury for its determination.

The Petitioner was not permitted to let the jury know that the complaining witness had made numerous allegations of sexual abuse by persons other than the Petitioner, which allegations, if true, would explain both the psychological and physical “*corroborating*” evidence. The defense was also not permitted to let the jury know that the complaining witness had made

repeated false allegations of sexual abuse for as little a reason as she did not want to spend the weekend at a barbecue – surely an issue impacting on the credibility of the allegations against the Petitioner and recognized as admissible by the holding in Quinn.

In part, the Petitioner’s inability to present this evidence to the jury arises from the failure on the part of the state to fully disclose information which was necessary to prove the falsity of the many, many allegations against others made by the complaining witness.

Not only was the Petitioner prohibited from presenting information to the jury that was material to a fully-informed determination of guilt or innocence by the jury, but the Petitioner was denied due process of law by the seemingly intentional expression of an inappropriate opinion by a state’s expert and by the State vouching for the “honesty” of its witnesses.

The end result was a verdict based on incomplete and on improper evidence – a verdict that returned “guilty” counts as to every count in the indictment. The verdict was based on a trial process in which the Petitioner’s right to confront witnesses was unconstitutionally limited and his right to present a complete defense was critically limited.

## **VI. STATEMENT REGARDING ORAL ARGUMENT & DECISION**

Pursuant to Rule 18 of the Rules of Appellate Procedure, the defendant requests oral argument. Oral argument is appropriate under Rule 19(a) of the Rules of Appellate Procedure as this case presents a case involving assignments of constitutional error in the application of settled law. Oral argument is appropriate under Rule 20(a) of the Rules of Appellate Procedure as this case presents an issue of fundamental public importance as well as a claim of an unconstitutional ruling by the trial court.

The time period for oral argument under Rule 20(e) of the Rules of Appellate Procedure appears to be adequate to defense counsel.

Counsel believes that a memorandum decision as provided for in Rule 21 of the Rules of Appellate Procedure will not adequately address the issues raised herein and requests a formal opinion.

## VII. ARGUMENT

### 1. THE QUINN-BARBE ISSUE

During the course of reviewing the state's discovery, the defense identified various materials, believed to be admissible under existing state and federal precedents, which involved allegations of non-permissive sexual activity<sup>11</sup> upon the complaining witness, R.M., by persons other than the Petitioner. Similarly, the defense became aware of reports of allegations of non-permissive sexual activity by the complaining witness with persons other than the Petitioner which appeared to be false reports.

The defense provided a formal and timely notice to the state of its intent to use these matters in evidence at trial. The Petitioner's notice referenced the theory that the evidence was admissible to explain the psychological and physical symptoms exhibited by R.M., while also positing the theory that the evidence was admissible as a false report. The defense proffered the evidence to the trial court, including providing the documentary materials underlying the same. With respect to the September, 2009 reports, the trial court took testimony from the complaining witness and from a juvenile eyewitness, H.G.

This Court has indicated that a defendant may meet the requirement for admissibility under the decision of State v. Quinn, 200 W.Va. 432, 490 S.E. 2d 34 (1997), by making a good faith evidentiary proffer, where the proffer is based upon an affidavit, a reliable record, or a

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<sup>11</sup> The sexual activity was non-permissive by virtue of the fact that R.M. was, and is, incapable of giving consent to sexual activity by virtue of her age.

potential live witness. The proffer does not even have to consist of a proffer of admissible evidence. State v. Wears, 222 W.Va. 439, 447, 665 S.E. 2d 273, 281 (2008).

Verbatim, the Petitioner's notice appeared as follows:

1. The child, R.M., falsely reported that she was subjected to inappropriate sexual contact by Calip Morris, III and Calip Morris, IV. The child has admitted to a mental health professional that the reports were false claiming that she made the reports because she was confused by her mother. [D.H.H.R. Assessment dated 3/23/03 at p. 2]. An investigation was conducted by the Ohio County Sheriff's office and by D.H.H.R. and found these reports to be unsubstantiated.

A. February 26, 2006 report by Kristin Showalter at p. 000024

B. Voluntary Report dated March 5, 2003 at pp. 1-2.

C. OCSD Incident Report p. 1

D. Lt. Cuchta's 3/6/03 Report

2. The child, R.M., falsely reported that she was subjected to inappropriate sexual contact by both Sally Keefer and her husband, Patrick Keefer, or that she dreamed of inappropriate sexual contact with Sally Keefer and her husband, Patrick Keefer. The child has admitted to a mental health professional that the reports were false. An investigation by D.H.H.R. found the reports to be unsubstantiated. There are numerous reports by Jessica Morris of dream sexual assaults including early reports by R.M. that the sexual assaults by Jack Jones were dreams. Moreover, the child has reported to Jessica Morris that she dreamed that she was sexually assaulted by Lt. Cuchta during his interview of the child. [Taped interview of Jack Jones by Lt. Cuchta, interviews of Jessica Morris, Melody Morris, and Melanie Morris].

A. The Child and Adolescent Needs and Strengths and Comprehensive Multisystem Assessment dated 2/28/07 contains the following language:

"This placement was disrupted when Rhaven began to fantasize that her foster parents were going to have sexual intercourse in front of her and then involve her in the act. Rhaven also began to have sexual dreams where her foster mother was having sex with numerous men." (P.3)

B. "Clear evidence of antisocial behavior including but not limited to lying, stealing, manipulating others, sexual aggression, violence towards people, property or animals." [P. 11].

C. "Rhaven has fantasized that her former foster parents were going to sexually abuse her. She most recently was having dreams that her foster mother was having sex with other men (like she witnessed her mother doing) and was going to also include Rhaven in the act." (P. 18)

D. "Since Rhaven has been in placement at Pomegrante, she disclosed that while living in the home of her biological mother, she sexually assaulted an infant, male cousin by inserting a coat hanger in his penis. This happened in her bedroom. When she couldn't get the hanger out, the baby began crying and she yanked it out, put his diaper back on, and went downstairs." (P.18).

3. The Section II, Designated Individual Case Reviewer report dated 8/7/2007 contains the following language:

A. "Rhaven has fantasized that her former foster parents were going to sexually abuse her. She most recently was having dreams that her foster mother was having sex with other men (like she witnessed her mother doing) and was going to also include Rhaven in the act." (P. 13)

B. The child reports sexually oriented nightmares at the Keefer residence on pp. 18-19.

C. "According to information obtained through this reviewer's interview with Sally Keefer, Rhaven had been having some bizarre dreams, thoughts, and behaviors about two weeks prior to her removal from the Keefer home. Rhaven's bizarre behaviors allegedly started when Mr. and Mrs. Keefer were sitting next to each other on the couch in the living room with Rhaven also being in the room with them. Rhaven reportedly began to get very nervous and anxious that the Keefers were going to have sex and make her watch/participate. Around the same time, Rhaven began to report having dreams that involved Sally Keefer having sex with numerous men. Rhaven went to school one day and told school personnel that she had seen Mr. Keefer in his underwear. The school called Sally regard to this. Sally adamantly denied that this could have happened as her husband is a long-distance truck driver and is only home on weekends. She was positive Rhaven had never seen him dressed inappropriately. " (p. 21).

4. The child, R.M., has reported that her cousin, Sasha, inserted a hair brush into her vagina. The report is memorialized in the medical records of Dr. Romano for 7/18/01 with a report of "no obvious evidence of genital trauma. : Further details of the report provided by Jessica Morris, Melody Morris, and Melanie Morris; report mentioned in D.H.H.R. Assessment dated 3/23/03 at p. 2.

5. The child, R.M., has falsely reported that she was sexually abused by John Graham. R.M. has admitted that the report was false. [D.H.H.R. report of September 14, 2009 at pages 1 & 5]. An initial recorded interview at Harmony House resulted in R.M. stating that the report was false. In a later unrecorded interview by Linda Reeves, the child reportedly claimed that the report was true. John Graham and an eyewitness both deny that the report is true. In an agreed upon in camera interview by the Court, R.M. stated that the report was true while the eyewitness denied the truth of the report.

6. The child, R.M., has falsely reported that she was sexually abused by various men on at least three occasions. [D.H.H.R. report of September 14, 2009 at pages 3 & 5].

7. The child, R.M., has falsely reported that she was sexually abused by Patrick Keefer, a grandfather and a principal. [D.H.H.R. report of September 14, 2009 at page 4].

8. The child has reported that she saw her former foster sibling “Wesley” naked. The child later denied that she saw Wesley naked or that she made the report. [February 9, 2009 report of Solutions Outpatient Services].

9. R.M. has reported that she saw David Birch naked. [Sally Keefer’s notes on page 1]. R.M. has also reported that David Birch had intercourse with her. [Sally Keefer’s notes for Nov. 22, 2006; Pomegrante Report p. 9/33]. The report that William LNU and David Birch had sex with Remiss touched upon in the interview by Linda Reeves. R.M. denied that David Birch did anything to her except spanking her in that interview. [Hogan interview at pp. 10 & 12.].

10. R.M. has reported that she has had sex with her cousin Cole Vogelgin and was caught in the act. [Pomegrante Report p. 27/33].

(A.R. 404 – 406).

In the state’s case in chief, it introduced medical and psychological evidence to bolster the testimony of R.M. The evidence was that R.M. had a tear in her hymen at 6:00 o’clock, which was the result of blunt force trauma, consistent with penile penetration of the vagina. The state also introduced expert testimony as to the psychological symptoms exhibited by child victims of sexual assault. Those symptoms included age inappropriate sexual knowledge, age inappropriate sexual behavior, age inappropriate dressing, nightmares, and difficulty sleeping. According to the expert opinion testimony, R.M. exhibited all of these symptoms. In turn, the expert concluded, R.M. had been sexually assaulted as demonstrated by her psychological symptoms.<sup>12</sup>

The reports of other events of alleged sexual abuse by R.M. are admissible either under the holding in State v. Quinn, 200 W.Va. 432, 490 S.E. 2d 34 (1997) or under the holding in Barbe v. McBride, 521 F.3d 443 (2008). Either the reports are accurate renditions of fact by the complaining witness admissible under Barbe or they are false reports admissible under Quinn.

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<sup>12</sup> A State expert went so far as to say that it was her opinion that R.M. had been sexually assaulted by Jack Jones. Although that testimony was stricken, it had great weight for the reason that the defense was prohibited from providing alternative sources of those symptoms of sexual abuse.

If the reports are accurate, it is the Petitioner's position that they are admissible under the holding in Barbe, as a part of a defense based upon demonstrating causes of symptoms not attributable to the Petitioner. The defense intended to introduce them to provide alternative explanations of the etiology of the physical symptoms allegedly exhibited by R.M., to provide alternative explanations of the etiology of the psychological symptoms allegedly exhibited by R.M., to provide alternate sources for the age inappropriate sexual knowledge allegedly exhibited by R.M., and to provide alternate explanations for the sexualized behaviors allegedly exhibited by R.M.

If the reports are false reports, they are admissible under the holdings in State v. Quinn, 200 W.Va. 432, 490 S.E. 2d 34 (1997); and State v. Wears, 222 W.Va. 439, 665 S.E. 2d 273 (2008).

In order to secure the admission of evidence that an alleged victim of sexual assault has made other statements about being a victim of sexual misconduct, the proponent must first present evidence of the statements to the trial court in-camera after fair notice to the state. State v. Jessica Jane M., Syl. Pt. 1, 226 W.Va. 242, 700 S.E. 2d 302 (2010).<sup>13</sup>

In the case sub judice, the Petitioner's defense twice provided written notice to the state describing the evidence in great detail well in advance of trial. Additionally, a proffer was made comporting with the holding in Wears, which, at the time, was the controlling case law and which permitted proffers in Quinn hearings based upon an affidavit, a reliable record, or a potential live witness. Wears, 222 W.Va. 439 at 447, 665 S.E.2d at 281.<sup>14</sup>

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<sup>13</sup> Of course, as it should be noted, the Jessica Jane M. decision was not decided until nine (9) months after the trial in the present matter; nevertheless, it distills holdings in previous cases decided by the Court.

<sup>14</sup> The proffer did not even have to consist of a proffer of admissible evidence. Wears, 222 W.Va. 439 at 447, 665 S.E.2d at 281.

It should be noted, the defense observed all of the procedural niceties set out in State v. Jessica Jane M., supra, which resulted in a decision unfavorable to Jessica M. Accordingly, the trial court's holding cannot be sustained on the grounds set out in that decision. With that said, and the decision in State v. Jessica Jane M. not having been decided, the defense complied with the holdings in Quinn, Wears, and Barbe, which all require a decision based on the Rock/Lucas principles.

The test to determine whether or not a trial court's exclusion of proffered evidence by virtue of the rape shield law is (1) whether the testimony was relevant; (2) whether the probative value of the evidence unfairly outweighed its prejudicial impact; and (3) whether the state's compelling interests in excluding the evidence outweighed the defendant's right to present relevant evidence supportive of his or her defense. State v. Harris, Syl. Pt. 1, 226 W.Va. 471, 702 S.E. 2d 603 (2010). This Court has also held that a trial court must conduct a Rock/Lucas balancing test before ruling on the admissibility or exclusion of evidence based upon the rape-shield statute and the corresponding rules of evidence. Wears, supra at fn. 16.

In 2008, the Federal Fourth Circuit Court of Appeals held that West Virginia may not impose a per se rule requiring the exclusion of evidence based upon a rape shield law. The Fourth Circuit, further, held that such a decision must be made on a case-by-case basis based upon whether or not the exclusionary rule is "arbitrary or disproportionate" to the state's legitimate interests. Barbe, 521 F.3d at 449.

Although Barbe was decided on the basis of confrontation clause issues, it relied upon Michigan v. Lucas, 500 U.S. 145, 111 S.Ct. 1473 (1991), which is based upon the Sixth Amendment to the United States Constitution and recognizes that preclusion implicates both

confrontation clause issues and the right to present a defense. Lucas, 500 at 149, 111 S.Ct. at 1746; see also Syl. Pt. 2, Rock v. Arkansas, 483 U.S. 44, 107 S. Ct. 2704 (1987).

There is nothing in the record to suggest that the trial court performed a Rock/Lucas balancing test. Rather, the trial court excluded the evidence solely on the basis of the rule set out in Quinn, Syl. Pt. 4, *supra*.

The Quinn holding requires a showing of a strong probability that the alleged victim of a sexual assault has made false statements about being the victim of other sexual abuse before those statements can be admitted as evidence. Although this evidentiary standard has been approved by the Fourth Circuit, nothing suggests that this standard is the only factor to be analyzed by a trial court in addressing preclusion of evidence under a rape shield law.

In the present matter, the proffer, together with the documentary evidence and the testimony provided by R.M. and the eyewitness met the standards for admissibility set out in Wears, speaking to Quinn evidence, and was, likewise, sufficient if this Court determines that Barbe evidence requires a similar evidentiary proffer.

Again, and as referenced ante, the evidence was presented in a proffer based on reliable records supplied to the trial court, on the proffer of evidence by witnesses identified to the trial court, on recantations by the complaining witness documented for the trial court, and, in the case of the September, 2009 report, on the testimony of an eyewitness. As a proffer, it complied with the requirements set forth in the Wears decision.

Quite frankly, the evidence was of such a nature and of such an overwhelming quantity that it, indeed, met the requirement that there be a strong probability that the alleged victim of a sexual assault had made false statements about being the victim of other sexual abuse before

admission into evidence.<sup>15</sup> The sheer quantity of statements by R.M., a good portion of which were treated as false, by the reports themselves, generated by agents for the state, should have led to their admissibility in and of themselves.

In applying the standard first set by this Court in State v. Guthrie, 205 W.Va. 218, 518 S.E. 2d 83 (1999), and approved in the Harris decision, the proffered evidence was relevant.

The evidence was relevant under the holding regarding false statements in Quinn. The lower court's preclusion of the use of such evidence denied the Petitioner the opportunity to meaningfully confront R.M. on the one hand and to challenge the reliability of the psychological evaluations on the other hand.

Rule 403 the West Virginia Rules of Evidence permits exclusion of evidence if its probative value is *substantially* outweighed by the danger of *unfair* prejudice. And while the trial court found that the probative value of the evidence was outweighed by its prejudicial impact, there is nothing in the record by which it can be determined what the *unfair* prejudice was and how the trial court arrived at such a conclusion. Of course, the existence of simple bias caused by the admission of relevant evidence is not a basis for exclusion. All evidence is biased one way or the other.

A Rock/Lucas analysis is completely missing in the underlying matter. If the trial court had performed a a Rock/Lucas analysis, the result would have mitigated strongly in favor of the admission of the evidence.

With respect to the interests of the state in excluding such evidence, such interests were substantially diminished by the time the matter proceeded to trial. Barbe, supra at fn. 21, describes the state's interests as preventing psychological harm from harassment, humiliation,

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<sup>15</sup> While reciting the correct substantial probability standard, the trial court also cited a preponderance of evidence standard appearing to confuse the two standards.

and invasion of privacy. That interest was so attenuated by innumerable and multiple interviews and/or interrogations of R.M., by virtually any state agent with access to the child, so as to render the state's interest as near to non-existent as possible in the light of exhaustion of any effect on R.M. from multiple occurrences of intrusive interviews

The evidence had already been revealed in discovery; the evidence had been revealed in several pleadings. The evidence had been extensively discussed in several hearings. The September, 2009 material was the subject of an evidentiary hearing in which R.M. testified. With respect to the other matters, R.M. had been extensively questioned about them by agents of the state, including department workers, psychologists, and various foster parents.

The evidence was critical to the defense in presenting a theory that multiple suggestive interviews by the mother, the grandmother, health care providers, treating physicians, child protective service workers, foster parents, Harmony House interviewers, police officers, counselors, and psychologists had resulted in a series of false reports including the false reports leading to the indictment of the Petitioner, Jack Jones.

Just as the trial court found that the reports were not false, it also found that they were not true – completely abandoning the responsibilities of a finder of facts in an apparent suspension of the rules of logic.

If the reports were true, then they provided an alternative explanation for both the psychological and the physical symptoms, both of which could have been explained by a cause not attributable to sexual abuse by the Petitioner, not the least of which includes reports by R.M. that her cousin, Sasha, inserted a hair brush into her vagina; or that a person by the name of David Birch, and at least, three (3) other men had sexual intercourse with her.

The exclusion of this evidence not only prevented the Petitioner from meaningfully confronting R.M., it prevented him from meaningfully confronting the state's psychological and medical experts. The Petitioner was also prevented from presenting a defense through testimony of his experts based on review of the false reports and the causal multiple suggestive interviews.

The importance to the defense of both types of evidence is discussed in Barbe, 521 F.3d at 459. In that case, the Fourth Circuit came down on the side of the defense, holding that the defendant's interest in cross-examining the state's witnesses and in presenting a defense outweighed the interests of the state in excluding the evidence under a rape shield law.

The trial court's ruling in this area critically handicapped the defense. First, the defense was not able to introduce alternative sources for the psychological symptoms or the physical symptoms assuming that "sex" with David Birch equates to penetrating sexual intercourse not to mention the penetration by a hair brush. Second, the defense theory that the reports were the result of inappropriate activity with persons other than the Petitioner and the existence of multiple, inappropriate interviews was not able to be fully presented. Had the Petitioner's counsel been able to demonstrate to the jury that R.M. had made multiple false reports about other persons, a theory based on multiple interviews resulting in multiple false reports would have had irresistible weight resulting in an acquittal.

By introducing expert opinion evidence of psychological symptoms and conditions consistent with the existence of sexual assault, the state opened the door to Barbe evidence. The same held true with regard to physical symptoms. By the same token, when the state subjected R.M. to uncounted multiple interviews, it opened the door to Quinn-type evidence.

To allow the state to run rampant with evidence which bolsters its position while prohibiting the defense from meeting or explaining that evidence, clearly, deprives a defendant of his constitutional right to present a defense and to meaningfully cross-examine witnesses.

In the case at bar, the acts of the trial court in precluding the defense from introducing false reports on the one hand and true reports on the other hand impermissibly limited the ability of the defense to confront the State's witnesses and prevented the defense from presenting its case. Reversal is mandated.

## **2. THE FAILURE OF THE STATE TO PROVIDE EXCULPATORY EVIDENCE**

On or about September 14, 2009, the department generated a report regarding allegations made by R.M. against a respite foster care provider, John Graham. In that report, R.M. admitted she fabricated the abuse allegation as a ploy to get back into her foster mother's care. (A.R. 374, 378). In the report, mention was also made of other, prior false reports by R.M., including allegations that she had been sexually abused by various men on at least three (3) occasions. Said accusations may or may not have been in addition to reportedly false accusations made in regards to her foster father, Patrick Keefer, a grandfather and a principal. (A.R. 376 – 378).

In this report, statements claiming false reports appear to be attributed to R.M.'s foster mother, Sally Keefer. An interview of Sally Keefer and her live testimony denied that she ever made such statements. An interview of Mrs. John Graham claimed that the statements came from the department, and that there were also false reports about a teacher and a minister.<sup>16</sup>

The Petitioner, through counsel, repeatedly sought the name and address of the person who prepared the September 14, 2009 report so that the defense could call that person to testify in the Quinn/Barbe hearing, as well as trial, regarding the source of those false reports and/or

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<sup>16</sup> The interview of Ms. Graham is de hors the record but proffered to the trial court.

statements contained within the department's report; specific motions were even made, seeking the identity of both the author(s) and the source(s). In addition, the matter was raised at hearings. The Petitioner's counsel called the state's attorneys numerous times seeking the name of the author and the identity of the source. Motions to compel were filed. The only identifying information provided by the state was a *possible* first name of the person who prepared the report, which ultimately proved to be the wrong first name.

As a result, the defense was not able to identify that person, subpoena that person,<sup>17</sup> or use that person's testimony in the Quinn/Barbe hearing or at trial making the lower court's ruling that evidence of false reports were inadmissible as the Petitioner did not call live witnesses to substantiate their falsity particularly unjust.

This Court has recognized that the defense may utilize evidence of false reports by a complaining witness to impeach the witness in its decision in State v. Quinn decision, *supra*.

The state has a duty to disclose exculpatory evidence to the defense. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963). Impeachment evidence falls within the Brady rule. United States v. Bagley, 473 U.S. 663, 105 S.Ct. 3375 (1985); State v. Hawk, 222 W.Va. 248, 664 S.E. 2d 133 (2008).

The Petitioner asserts that the state's attorney may not delegate the review of information for discovery to another person or agency but must perform a review of information available to the state and disclose the appropriate materials. Kyles v. Whitley, 115 S.Ct. 1555, 514 U.S. 419 (1995).

In the present matter, the statements that R.M. had made several false reports constitute recognized exculpatory material. The source of those statements should have been made

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<sup>17</sup> The department responded to a Jane Doe subpoena by claiming that it could identify neither the report nor the person who prepared the report.

available to the Petitioner by the state before trial. See Weatherford v. Bursey, 429 U.S. 545, 97 S.Ct. 837 (1977). The state, in addition, had the duty to search all information available to them, and provide that information to the Petitioner. See Banks v. Dretke, 124 S. Ct. 1256, 540 U.S. 668 (2004). The state's attorney had a mandatory constitutional duty to seek out the identity of the author of the report, as well as the source of the exculpatory information, and provide it to the Petitioner and his counsel.

Moreover, where the state fails to provide exculpatory evidence to the defense, it violates a defendant's right to due process of law. Cone v. Bell, 556 U.S. 449, 129 S.Ct. 1769 (2009).

In the case sub judice, and as a result of the state's failure to fulfill its obligations, the trial court prohibited the Petitioner using the information contained within the September 2009 report because the defense had not met its burden under Quinn, showing a strong probability that the reports were false; nor the burden purportedly set forth under the Barbe decision, showing that the reports were true. Clearly, the state's action, or inaction, served to abrogate the Petitioner's right to due process of law. See id.

### **3. AN IMPROPER OPINION ON THE ULTIMATE ISSUE**

During the course of the trial in the underlying matter, the State of West Virginia called Maureen Runyon, a mental health expert employed by Women's and Children's Hospital, to provide opinion testimony permitted by her qualifications. Pursuant to pretrial discovery, the state indicated that Ms. Runyon would testify in conformity with her notes and reports, and would provide an opinion in conformity with the same.

As expected, Ms. Runyon testified that R.M. exhibited symptoms of children who had been victims of sexual assault. As expected, Ms. Runyon testified that R.M. had been sexually assaulted. Much to the surprise of the defense, however, Ms. Runyon testified that it was her

opinion that the Petitioner, Jack Jones, sexually assaulted R.M., which, it should be noted, came in response to a question that risked such a response.

The testimony came after a pause in Ms. Runyon's delivery and appeared to be calculated and considered.

Counsel for the Petitioner promptly objected to the inappropriate opinion offered by Ms. Runyon and requested a mistrial, arguing that a curative instruction would not be sufficient for the reason that the case was built on the testimony of R.M., that the opinion improperly bolstered the testimony of R.M., and that the delivery of the opinion was of such a decisive nature that it carried great persuasive weight.

After considering and researching the matter at some length, the trial court denied the request for a mistrial, ordered the testimony stricken from the record, and gave a curative instruction.

An expert may not give an opinion as to whether or not he believes a child or whether or not a child was sexually assaulted by a particular defendant as this would improperly and prejudicially invade the province of the jury. Syl. Pt. 3, State v. Martin, Syl. Pt. 3 687 S.E.2d 577, 687 S.E. 2d 360 (2009); State v. Edward Charles L., 183 W.Va. 641, 398 S.E.2d 123 (1990). Where an expert gives such an opinion, it requires reversal of a conviction where the defendant is prejudiced. Id.

In the case at bar, the Petitioner was prejudiced. See id.

As referenced ante, the Petitioner focused on multiple inconsistent reports in multiple interviews by (foster) parents, relatives, law enforcement, and mental health professionals, which on the one hand, rendered the child's testimony not credible. On the other hand, the Petitioner asserted that although the child may have been sexually assaulted, it was not by the Petitioner,

but by some other person(s). The testimony offered by Maureen Runyon, that it was her professional opinion that the Petitioner, Jack Jones, sexually assaulted R.M. struck at the heart of both defenses.

Of course, the blow was made even more substantive and prejudicial by the fact that the Petitioner was prohibited from even introducing evidence of other non-permissive sexual activity reported by R.M., which served to provide alternate causes of the physical and psychological symptoms, and which, ultimately, was attributable *solely* to the Petitioner.

In the end, not only was Ms. Runyon's opinion improper, but its prejudicial impact was enhanced by the fact that the defense could not cross-examine her about other reported sexual behavior which may have caused the observed behavior and symptoms. Reversal of conviction is mandated. See Martin; see Edward Charles L.

#### **4. COMMENTS VOUCHING FOR CREDIBILITY OF WITNESSES**

During the course of closing argument, Assistant Prosecuting Attorney, Gail W. Kahle, put forth that the state had presented "an honest case with honest witnesses." (A.R., Vol. II, 982). He, further, went on to assert that the state's medical expert, Dr. Joan Phillips, had presented honest testimony. (A.R., Vol. II, 972 – 977). Assistant Prosecuting Attorney, Jenna Wood, later, during the state's rebuttal, declared that she had been taught in law school to put a "spin" on evidence to advance her theory of the case, but that she refused to do so in this case, thereby suggesting manipulative tactics, the dishonorable "spin" of the evidence, by the Petitioner's counsel during his closing remarks. (A.R., Vol. II, 1014 – 1015).

The general rule is that "[i]t is improper for a prosecutor in this State to '[a]ssert his personal opinion as to the justness of a cause, as to the credibility of a witness ... or as to the guilt or innocence of the accused....'" Syl. Pt. 3, State v. Critzer, 167 W.Va. 655, 280 S.E.2d 288

(1981); in accord with Syl. Pt. 8, State v. Collins, 186 W.Va. 1, 409 S.E.2d 181 (1990); Syl. Pt. 7, State v. Petrice, 183 W.Va. 695, 398 S.E.2d 521 (1990). See also Syl. Pt. 1, Critzer, supra (requiring a prosecutor to set a tone of fairness and impartiality); State v. England, 180 W.Va. 342, 376 S.E.2d 548, 557 (1988) (a prosecutor's status should not be used to bolster a witness' credibility).

The Petitioner chose not to object to these statements in the light of the fact that one of the state's expert witnesses, Maureen Runyon, had previously vouched for the credibility of R.M. and expressed an opinion about the guilt of the Petitioner; the fear being that an objection would only emphasize the prior opinion expressed by Ms. Runyon. The Petitioner, instead, first raised the issues in post-trial motions.

These comments are particularly objectionable in the light of the previous expression of opinion by Ms. Runyon. Moreover, the "honest" testimony of Dr. Joan Phillips was contrasted to the contradictory testimony regarding physical evidence introduced through the Petitioner's expert witness, Dr. Stephen Guertin, with the clear statement being that Dr. Phillips' testimony was honest and that of Dr. Guertin's was purchased. (A.R., Vol. II, 972 – 977). The state's bolstering of Dr. Phillips' particular testimony is critical for the further reason that she had testified in the first trial about physical findings consistent with sexual assault that were clearly wrong and changed her testimony in the second trial. (Compare A.R., Vol. II, 112 – 159, 178 – 189 with A.R., Vol. II, 459 – 510). The "honesty" of Dr. Phillips' was mentioned in the context of explaining her volte-face in the second trial.

The state vouched for the credibility of all of its witnesses and that of Dr. Phillips in particular. The prejudicial impact of the improper vouching was tremendous in a case where the opinion evidence is hotly contested by both parties, an expert has changed her testimony from

previous testimony, and the defense is based upon the argument that multiple interviews resulted in false reports, coupled with a challenge to the physical findings.

### VIII. CONCLUSIONS

The cumulative effect of the errors complained of herein resulted in a denial of the Petitioner's Sixth Amendment Rights to due process of law, to confront the evidence against him, and to present a defense. The cumulative effect of the errors complained of resulted in a denial of the Petitioner's right to due process, to confront the evidence against him, and to present a defense provided for in Article III, Sections 10 and 14, of the West Virginia Constitution.

Any single error complained of herein mandates reversal and a grant of a new trial. Where the record shows that the cumulative effect of errors complained of prevented the defendant from receiving a fair trial, a new trial should be granted. State v. Cecil, 221 W.Va. 495, 655 S.E. 2d 517 (2007).

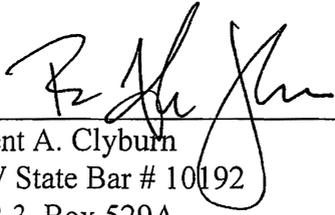
In the case at bar, each of the errors requires reversal and the grant of a new trial. Moreover, the cumulative effect of the errors complained of requires reversal and the grant of a new trial.

Respectfully submitted,  
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## CERTIFICATE OF SERVICE

Stephen D. Herndon hereby certifies that he served true and accurate copies of the Petitioner's Brief and Volume I and Volume II of Petitioner's Appendices on the State of West Virginia by depositing true copies of the same in the United States mail, first class postage prepaid on the 14<sup>th</sup> day of March, 2012, addressed as follows:

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