

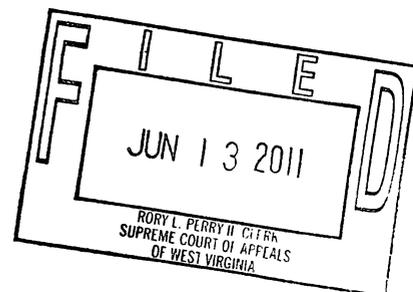
NO. 11-0282

IN THE SUPREME COURT OF APPEALS

OF

WEST VIRGINIA

CHARLESTON, WEST VIRGINIA



STATE OF WEST VIRGINIA
Plaintiff Below, Appellee

v.

JONATHAN SCOTT BOURNE
Defendant Below, Appellant

Circuit Court of Mineral County
The Honorable Judge Jordan
Case No. 10-F-150

PETITIONER'S BRIEF

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PETITION

**TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA**

I. ASSIGNMENTS OF ERROR

A. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLOWING THE STATE TO ADMIT IN ITS CASE IN CHIEF THE DOMAIN NAMES OF EIGHT PORNOGRAPHIC FILES DISCOVERED ON THE PETITIONER'S COMPUTER APPROXIMATELY FOUR YEARS AFTER THE ALLEGED CRIMES CHARGED IN THE INDICTMENT AS THE PROBATIVE VALUE OF SUCH EVIDENCE WAS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE, IS NOT RELEVANT AND DOES NOT QUALIFY UNDER THE HOLDING IN *STATE v. EDWARD L.* IN THE ALTERNATIVE, THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO READ A LIMITING INSTRUCTION TO THE JURY AT THE TIME THE PORNOGRPAHIC FILE EVIDENCE WAS INTRODUCED INTO EVIDENCE

B. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY APPLYING THE RAPE SHIELD STATUTE IN SUCH A MECHANISTIC MANNER AS TO VIOLATE THE PETITIONER'S CONSTITUTIONAL DUE PROCESS RIGHTS TO A FAIR TRIAL

C. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING EVIDENCE OF THE PETITIONER'S ILLEGAL NARCOTIC AND UNDERAGE ALCOHOL CONSUMPTION WITHOUT CONDUCTING A *MCGINNIS* HEARING

D. IT WAS CLEARLY ERRONEOUS FOR THE TRIAL COURT TO FIND THE INFORMATION CONTAINED WITHIN THE FOUR CORNERS OF THE AFFIDAVIT AND COMPLAINT FOR SEARCH WARRANT WAS SUFFICIENT TO SUPPORT PROBABLE CAUSE TO ISSUE THE AUGUST 3, 2010 SEARCH WARRANT PERMITTING DEPUTY VEACH TO SEARCH THE CONTENTS OF THE PETITIONER'S COMPUTER

**II. KIND OF PROCEEDING AND THE NATURE OF THE RULINGS IN THE
LOWER TRIBUNAL**

On May 3, 2010, the Petitioner was arrested by warrant and subsequently indicted by a grand jury on September 10, 2010, for second degree sexual assault, incest, detaining with the intent to defile and conspiracy. The charged crimes allegedly occurred around July or August of 2006. On September 10, 2010, the Honorable Philip Jordan *sua sponte* appointed M. Zelene

Harman, Esq. as the Guardian Ad Litem for the alleged victim, M.S.B.

On September 24, 2010, an initial in-camera hearing was held regarding the admissibility of pornographic files discovered on a computer that was in the Petitioner's possession at the time of his arrest and a statement taken from the Petitioner at the Potomac Highlands Regional Jail. The Court ruled that the pornographic files and statement were both admissible. [Appendix, page 27]

On November 10, 2010, a pre-trial hearing was held in response to Petitioner's motion *in limine* to exclude the identification of the co-defendant, and motion *in limine* to exclude the pornographic files discovered on the Petitioner's computer. Both motions were denied by the Court. [Appendix, page 29] The Court also considered the State's motion to introduce evidence that the Petitioner was drinking alcohol and taking narcotics the night the alleged rape occurred and the State's motion to introduce the Petitioner's statement that the victim had been present at his grandmother's residence on prior occasions when Petitioner and Co-Defendant were partying. After consideration by the Court, the State's motion was granted. [Appendix, page 29] At the conclusion of the hearing, the Petitioner informed the Court that he intended to introduce a diary / notebook belonging to the victim where she stated in writing she was a virgin at a time after the alleged 2006 rape and that she has only had one sexual partner by the name of Chris. [Appendix, pages 23 & 26] The Court did not rule on the admissibility of the diary / notebook at the November 10, 2010 hearing and continued the matter for further consideration.

On November 12, 2010, a final in-camera hearing was held at which time the Court considered whether to introduce the diary / notebook of the victim. After consideration by the Court, the Petitioner's motion was denied. [Appendix, page 33]

A jury trial commenced on November 15, 2010, and on November 16, 2010 twenty four

year old Jonathan Scott Bourne was convicted of second degree sexual assault, incest, detaining with the intent to defile and conspiracy. The jury was initially deadlocked and requested guidance from the Court. However, after the Court read the *Allen* charge to the jury, a unanimous guilty verdict was returned twenty minutes later. The Petitioner was denied post-judgment bail, immediately remanded to the custody of the Sheriff and transported to the regional jail. On December 13, 2010, the Petitioner moved the Court for a new trial. The Court denied Petitioner's motion and imposed the maximum sentence by running the indeterminate sentences for each count consecutively for a period of imprisonment of not less nineteen nor more than fifty-five years.

III. STATEMENT OF THE CASE

On November 3, 2009, sixteen year old M.S.B. reported to the office of Keyser High School Prevention Resource Officer Deputy Paul Karalewitz at approximately 8:45 a.m. M.S.B. advised Deputy Karalewitz that she was held down and raped at her grandmother's residence approximately three years ago by her half-brother¹, Jonathan Scott Bourne, and Kilton Kitchen. M.S.B. did not know the actual date when the alleged rape occurred, but estimated it was sometime between the end of June and beginning of August, 2006. At the time of the alleged rape, M.S.B. was thirteen years old, Jonathan Bourne was twenty years old, and Kilton Kitchen was eighteen years old. Deputy Karalewitz requested that M.S.B. provide him with a handwritten statement in her own words describing the incident. Later in the day on November 3, 2009, M.S.B. provided Deputy Karalewitz with a three page handwritten statement.

On November 6, 2009, Deputy McKone spoke to Deputy Karalewitz and was given a folder containing a brief summarized narrative of the alleged incident and the names of all

¹ Jonathan Scott Bourne and M.S.B. have the same father. At the time of the alleged rape Jonathan was living with Shirley Bourne, his paternal grandmother.

parties involved. Deputy Karalewitz advised Deputy McKone that M.S.B. told her current boyfriend Jacob Rexrode about the alleged rape and he persuaded M.S.B. to report it to the police. On November 17, 2009, Deputy Taylor and Deputy Leatherman met with M.S.B. at Keyser High School for a follow up interview.

The case remained inactive until April 25, 2010, when Deputy Veach was assigned the case after Deputy Taylor ended his employment at the Mineral County Sheriff's Department. Deputy Veach reviewed the file and made contact by phone with M.S.B. and met with her at her boyfriend's residence. M.S.B. advised she was still terrified of Jonathan and Kilton, and wanted to have something done. On May 1, 2010, Deputy Veach obtained an arrest warrant for Jonathan Scott Bourne and executed said warrant on May 2, 2010 at his grandmother's residence in Burlington.

At trial, M.S.B. testified that the day of the alleged rape Jonathan called her and asked if she wanted to hangout with him and Kilton for the night at their grandmother's residence. [Trial Transcript, page 177, line 2] M.S.B. agreed and arrived at her grandmother's residence between 5:00 p.m. and 6:00 p.m. According to M.S.B., Jonathan and Kilton stated they wanted to drink and left the residence and returned with a bottle of "Everclear" and a twenty-four pack of Bud Light at 8:00 p.m. [Trial Transcript, page 179, line 6-17] M.S.B. denied consuming any alcohol. After some drinking, M.S.B. reported that both Jonathan and Kilton left her grandmother's residence to buy "pills." [Trial Transcript, page 178, line 20] Upon return, M.S.B. stated that Jonathan and Kilton started "snorting pills." [Trial Transcript, page 180, line 3] M.S.B. denied taking any pills. M.S.B. stated that she began to get aggravated with Jonathan and Kilton because they insistently pressured her to drink and take pills. M.S.B. left the basement and went upstairs to use the bathroom and when she returned Jonathan and Kilton were playing video

games and getting really drunk. M.S.B. stated Jonathan and Kilton left the room and everything started to get weird. M.S.B. stated she just wanted to lie down and both Jonathan and Kilton kept telling her to get up. M.S.B. reported that the night was “seeming like almost any other night I had with Jonathan and Kilton except I was felling really shitty.” [Appendix, page 21] M.S.B. stated that Kilton walked back into the room and told M.S.B. she was beautiful and “stuff started happening.” [Trial Transcript, page 184, line 22] M.S.B. stated Jonathan grabbed her legs and was trying to rip her pants off while Kilton held her arms down. [Trial Transcript, page 185, line 2-5] M.S.B. next alleged that she was fighting to get both Kilton and Jonathan off of her, but they were “overpowering” her. [Trial Transcript, page 185, line 12] M.S.B. stated that Jonathan raped her first.

M.S.B. alleged that she was able to squirm away from Jonathan, but Kilton grabbed her and tossed her back down onto Jonathan’s bed and was held down by both Kilton and Jonathan while Kilton raped her. According to M.S.B., Kilton raped her for an additional thirty minutes. [Appendix, page 22] M.S.B. stated she was screaming and crying while this occurred and that Jonathan told Kilton to turn the music up. More specifically, M.S.B. testified that she was “... yelling, like as loud as I could and just trying to get my grandma to hear me.” [Trial Transcript, page 201, line 22] According to M.S.B., her grandmother was present in the 1800 square foot rancher style residence, but never came downstairs during the course of the evening. [Trial Transcript, page 183, line 3 & Trial Transcript, page 229, line 1]

After Kilton finished, M.S.B. stated that Kilton told her that if she ever told anyone they would kill her. [Trial Transcript, page 188, line 4] M.S.B. went upstairs and took a shower and cried. After she gathered herself, M.S.B. states that she put the incident in the back of her head. M.S.B. stated she reported the incident to her father Roger Scott Bourne approximately one

month later. [Trial Transcript, page 190, line 6] However, at trial Roger Bourne testified that M.S.B. never talked to him about the alleged rape. [Trial Transcript, page 274, line 24]

Jonathan and M.S.B.'s grandmother, Shirley Bourne, testified she did not hear loud music or M.S.B. screaming the night the violent sexual assault allegedly occurred. Shirley Bourne testified that anytime it "got loud" or their "voices got too high" she would go downstairs and find out what was going on. [Trial Transcript, page 228, line 12-17] Shirley Bourne further testified that she usually stays up at night "till 11:00" and sleeps "very light." [Trial Transcript, page 230, line 15-24] When describing her granddaughter, Shirley Bourne testified that "she can be peculiar sometimes." [Trial Transcript, page 224, line 3]

Betty Rogers, a family friend, testified that she has observed Jonathan and M.S.B. quite often since 2006 and "they seem okay, just like brother and sister. I mean, I never seen anything, you know, out of the way with them." [Trial Transcript, page 256, line 11-13 & Trial Transcript, page 258, line 10-12] Another family friend, Lori Inskeep, testified that she has known the Bourne family her entire life and that Jonathan and M.S.B. appeared to get along fine until July, 2008. [Trial Transcript, page 342, line 1-25] According to Lori Inskeep, "Miranda did start getting attitude toward Jonathan." [Trial Transcript, page 342, line 6]

At trial, Jonathan testified that he got into an argument with M.S.B. in November, 2009 about her boyfriend and M.S.B. had a "very big attitude problem with me." According to the Jonathan, he had the argument with M.S.B. "within a week before or a week after" M.S.B. gave her initial statement to Deputy Karalewitz. [Trial Transcript, page 310, line 6] Jonathan denied raping M.S.B. at trial and in his initial statement to the police the day he was arrested. [Trial Transcript, page 322, line 12]

IV. STANDARD OF REVIEW

A. This Court applies a two-tier standard of review to the denial of a motion to suppress. *State v. Farley*, 192 W.Va. 247, 452 S.E.2d 50 (1994) By applying a two-tier standard, this Court must first review a circuit court's findings of fact when ruling on a motion to suppress evidence under the clearly erroneous standard. *Id.* Second, this Court must review *de novo* questions of law and the circuit court's ultimate conclusion as to the constitutionality of the law enforcement action. Under the clearly erroneous standard, a circuit court's decision ordinarily will be affirmed unless it is unsupported by substantial evidence; based on an erroneous interpretation of applicable law' or, in light of the entire record, this Court is left with a firm and definite conviction that a mistake has been made. *State v. Stuart*, 192 W.Va. 428, 452 S.E.2d 886, 891 (1994)

B. When balancing the probative value of other crimes evidence against danger of unfair prejudice, trial court enjoys broad discretion, and such discretion will not be overturned absent a showing of clear abuse. *State v. Taylor*, 215 W.Va. 74, 593 S.E.2d 645 (2004) “We have also cautioned, however, that we will not simply rubber stamp the trial court's decision when reviewing for an abuse of discretion.” *State v. Hedrick*, 204 W.Va. 547, 514 S.E.2d 397 (1999)

C. Under the *State v. Guthrie* test, this Court reviews a trial court's ruling under an abuse of discretion standard. *Id.*

V. SUMMARY OF ARGUMENT

The four count indictment returned against the Petitioner stems from an alleged sexual assault that occurred at Jonathan and M.S.B.'s paternal grandmother's residence in Mineral County, West Virginia in 2006. The facts as alleged by M.S.B. are undoubtedly horrifying and repulsive. However, upon a close review of the record in this case, it is clear that the trial court

erred in admitting highly prejudicial evidence, including pornographic files that were discovered on the Petitioner's computer approximately four years after the alleged rape, and evidence of illegal narcotic and underage alcohol consumption. The Circuit Court also impermissibly denied the Petitioner the opportunity to produce relevant evidence vital to his defense at trial, including a diary / notebook kept by M.S.B. whereby she maintained that she was a virgin at a date after the alleged sexual assault and has only had sexual intercourse with one partner by the name of Chris. In sum, the Petitioner was denied the right to a fair trial.

VI. **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Petitioner states that the assignments of error raised in error A-C of the Petition are proper for consideration by oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure as the issues involve constitutional questions regarding the lower court's pre-trial rulings.

The Petitioner states that the assignment of error raised in error D has been authoritatively decided and oral argument is not necessary unless the Court determines that other issues raised upon the record should be addressed.

VII. **ARGUMENT**

A. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLOWING THE STATE TO ADMIT IN ITS CASE IN CHIEF THE DOMAIN NAMES OF EIGHT PORNOGRAPHIC FILES DISCOVERED ON THE PETITIONER'S COMPUTER APPROXIMATELY FOUR YEARS AFTER THE ALLEGED CRIMES CHARGED IN THE INDICTMENT AS THE PROBATIVE VALUE OF SUCH EVIDENCE WAS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE, IS NOT RELEVANT AND DOES NOT QUALIFY UNDER THE HOLDING IN *STATE v. EDWARD L.* IN THE ALTERNATIVE, THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO READ A LIMITING INSTRUCTION TO THE JURY AT THE TIME THE PORNOGRPAHIC FILE EVIDENCE WAS INTRODUCED INTO EVIDENCE

On August 3, 2010, Deputy Veach obtained a search warrant to view the contents on a

Dell computer found in the Petitioner's bedroom at his grandmother's residence the day he was arrested. As a result of the search, several pornographic files were discovered by Deputy Veach. The discovered files revealed the domain names of eight different adult pornographic internet files. In reference to the pornographic files, Deputy Veach made a handwritten note on the property receipt that stated, "all files created April 29, 2010, of the files that opened none seemed to contain child pornography, but were pornographic videos." [Appendix, page 19] In response to the Petitioner's "Motion In Limine Regarding Pornographic Films," the Court held an in-camera hearing on November 10, 2010. [Appendix, pages 10 & 29] In admitting the pornographic files, the Court reasoned, "I understand it's very prejudicial, but it goes to the question, and I relate back to the Supreme Court case, landmark case of *Edward L.*, *In The Matter of Edward L.*, the Mineral County case that I was the Prosecutor in, and in that instance, such things can be brought in to show lustful disposition towards children." [November 10, 2010 Motion Hearing, page 10, line 12-19]

The lower court erroneously interpreted and applied the *Edward L.* case. In *Edward L.*, this Court specifically held, "collateral acts or crimes may be introduced in cases involving child sexual assault or sexual abuse victims to show the perpetrator had a lustful disposition towards the victim, a lustful disposition to children generally, or a lustful disposition to specific other children, provided such acts occurred reasonably close in time to the incident(s) giving rise to the indictment." *State v. Edward L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990)

In *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986) Justice McHugh stated, "[t]he victim's testimony as a crucial element of the State's case must be examined in context in order to establish a complete record of events, thereby reducing the incredibility of the victim's testimony. Therefore, carving out a sexual propensity exception allows the finder of facts to

weigh the credibility of the victim's unabridged testimony.” Furthermore, the *Edward L.* Court held “we find this [Justice McHugh dissent in *Dolin*] rationale to be particularly applicable in cases involving child victims.” *Edward L.* at 651 The Court further noted, “[t]his is evident since these cases generally pit the child’s credibility against an adult’s credibility and often times an adult family member’s credibility.” *Id.*

The credibility rationale cited in the dissenting opinion in *Dolin* and cited in *Edward L.* in support of introducing evidence of lustful disposition towards children was not an issue in the present case for several reasons. First, in 2006, M.S.B. was a thirteen year old young women getting ready to start High School, and the Petitioner just turned twenty. It is apparent from reading *Edward L.* and *Dolin* that the Court intended the application of lustful disposition evidence in criminal cases involving very young children, not teenagers, who have allegedly been sexually assaulted or abused by an adult. Second, the adult pornographic file evidence discovered on the Petitioner’s computer fails to show a lustful disposition towards children.

Edward L. also makes it clear that the acts of lustful disposition must occur reasonably close in time to the incident giving rise to the indictment. As previously stated, M.S.B. alleged she was raped by the Petitioner in the summer of 2006. According to Deputy Veach, the pornographic files that were discovered on the Petitioner’s computer were created on April 29, 2010, just four days prior to the Petitioner’s arrest. It is readily apparent that the pornographic file evidence was not close in time to the alleged rape, thus not satisfying the timeliness standard detailed in *Edward L.* Consequently, under the clearly erroneous standard, the Circuit Court's decision is an erroneous interpretation and application of the law.

Assuming *arguendo* that the pornographic file evidence was proper pursuant to *Edward L.*, the Petitioner submits that the trial court abused its discretion by not excluding said evidence

pursuant to Rule 403 of the West Virginia Rules of Evidence. Rule 403 states, “although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...” *W.Va. R. Evid.* 403 Petitioner submits said evidence was introduced solely for the purpose of damaging his character as pornographic material is usually highly offensive to the average jury. The lower court, in its analysis in deciding whether to admit the pornographic files specifically stated, “I understand it’s very prejudicial...”

[November 10, 2011 Motion Hearing, page 10, line 12] This Court has reasoned that “since the uncorroborated testimony of the victim is sufficient evidence for a conviction in sexual offense cases, unless inherently incredible, courts should be particularly wary of collateral sexual offense evidence.” *State v. Beck*, 167 W.Va. 830, 286 S.E.2d 234 (1981) Furthermore, the indictment charges the Petitioner with crimes that allegedly occurred in 2006. As such, the pornographic file evidence discovered on the Petitioner’s computer approximately four years after the charged crimes in 2010 is not relevant under Rule 401 of the West Virginia Rules of Evidence. For the several reasons set forth above, the Court abused its discretion in admitting the pornographic file evidence.

In the case *sub judice*, the Court failed to read a limiting instruction to the jury at the time Deputy Veach testified regarding the list of pornographic files discovered on the Petitioner’s computer. Without a proper limiting instruction, the prosecuting attorney simply asked Deputy Veach on direct examination to read to the jury the list of pornographic files discovered on Petitioner’s computer. [Trial Transcript at 157, line 25] A limiting instruction was read to the jury, but it was only in the general charge to the jury at the conclusion of evidence prior to closing arguments. As held in *State v. McGinnis*, a limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general

charge to the jury at the conclusion of the evidence.” *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994) The obvious concern is the risk of prejudice from the pornographic file evidence and the lack of a limiting instruction to adequately protect the Petitioner’s constitutional rights. By not reading the limiting instruction until after the close of evidence, the force and effect of the instruction was greatly diminished and failed to mitigate any danger that the jury considered the evidence improperly as proof of bad character.

B. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY APPLYING THE RAPE SHIELD STATUTE IN SUCH A MECHANISTIC MANNER AS TO VIOLATE THE PETITIONER’S CONSTITUTIONAL DUE PROCESS RIGHTS TO A FAIR TRIAL

On November 12, 2010, the Court held an in-camera hearing regarding the admissibility of a diary / notebook maintained by M.S.B. The diary / notebook is important to the case because M.S.B. wrote that she was a virgin at a time after she was allegedly raped by the Petitioner. [Appendix, pages 23 & 26] More specifically, M.S.B. wrote in her diary / notebook after the alleged 2006 rape that she had sex with a guy named Chris and to “save your virginity for somebody special. Like don’t do what I did. It’s not worth it. Trust me, I know now. And another reason you can’t say anything is that Chris is eighteen.” [November 12, 2010 Motion Hearing, page 8, line 16 & Appendix, page 23] In another excerpt, M.S.B. wrote “...i’ve only had sex like six times but it has all been with the same person and that’s been Chris...” [Appendix, page 26] The Petitioner sought to introduce the written notebook to show that M.S.B. falsely reported the incident involving the Petitioner.

W.Va. Code § 61-8B-11(b) states, “[i]n any prosecution under this article evidence of specific instances of the victim's sexual conduct with persons other than the defendant, opinion evidence of the victim's sexual conduct and reputation evidence of the victim's sexual conduct shall not be admissible: Provided, That such evidence shall be admissible solely for the purpose

of impeaching credibility, if the victim first makes his or her previous sexual conduct an issue in the trial by introducing evidence with respect thereto.”

The Court limited any chance that the written statement could come into evidence pursuant to W.Va. Code § 61-8B-11(b) by instructing the Prosecuting Attorney and Guardian Ad Litem to ask questions at trial in a manner where the virginity issue is not raised by M.S.B. [November 12, 2010 Motion Hearing, page 19, line 17-20] However, the Court failed to consider the Petitioner’s due process right to a fair trial in its analysis.

The test used to determine whether a trial court's exclusion of proffered evidence under the West Virginia rape shield law violated a defendant's due process right to a fair trial is the following, *to-wit*; 1) whether that testimony was relevant; 2) whether the probative value of the evidence outweighed its prejudicial effect; 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. Guthrie*, 205 W.Va. 326, 518 S.E.2d 83 (1999) Under the *Guthrie* test, this Court reviews a trial court’s ruling under an abuse of discretion standard. *Id.*

In applying the *Guthrie* test to the case *sub judice*, it is clear that the evidence sought to be introduced by the Petitioner was highly relevant for exculpatory purposes and probative in the context of his defense that he did not commit the rape and that M.S.B. was not telling the truth. It is important to note that the jury originally at least had some doubt as to the Petitioner’s guilt due to the fact that they informed the Court that they were deadlocked and had to be read the *Allen* charge. Furthermore, this case was essentially a “he said she said” case. There was no physical evidence or corroborating evidence that the Petitioner committed the charged crimes, thus substantially increasing the probative value of the excluded evidence to the Petitioner’s defense.

Under the second prong in *Guthrie*, it is clear the probative value of the notebook evidence outweighed its prejudicial effect. Unlike *Guthrie*, in the case *sub judice* the excluded notebook evidence would not have been highly inflammatory to the victim and the State or deter future victims from reporting sexual assaults. In addition, the Petitioner did not seek to introduce the evidence solely to denigrate the character of the victim.

Under the third prong in *Guthrie*, the State's compelling interest in excluding the evidence did not outweigh the Petitioner's right to present relevant evidence supportive of his defense. As in *Guthrie*, the Petitioner's argument is presented in terms of excluding "relevant" evidence in violation of the state and federal constitutional guarantee of a fair trial, as embodied in the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article 3, § 14 of the West Virginia Constitution. This Court has previously held that the rape shield law "may be required to yield if it conflicts with well-established due process constitutional rights." *State v. Stacy*, 179 W.Va. 686, 371 S.E.2d 619 (1988) Other court have held similarly. The Maryland high court held, "[o]f course, rape shield laws may not be used to exclude probative evidence in violation of a defendant's constitutional right of ... due process." *Thomas v. State*, 301 Md. 294, 483 A.2d 6 (1983) The Missouri high court held, "the rape shield statute may not be applied so strictly as to deprive the defendant of the fair trial comprehended by the concept of due process." *State v. Douglas*, 797 S.W.2d 532 (1990) The Tennessee high court held, "rape shield laws recognize those circumstances in which the admission of such evidence, despite its potentially embarrassing nature, must be admitted to preserve an accused's right to a fair trial." *State v. Sheline*, 955 S.W.2d 42 (1997)

The above states share the common principal and goal of the rape shield statute as detailed in *Guthrie*, *to-wit*; "the rape shield statute should be raised in a manner consistent with

its purpose. That purpose is not to preclude relevant evidence. If it were, the statute could never conform with constitutional imperative under ... the fourteenth amendment's due process clause.” [emphasis mine] *State v. Guthrie*, 205 W.Va. 326, 518 S.E.2d 83 (1999)

The excluded evidence was constitutionally necessary for a fair trial. Justice Starcher’s concurring opinion in *Guthrie* details the concerns and assignment of error raised by the Petitioner, *to-wit*;

I write separately to emphasize the consistent recognition by this Court that a trial court must give a defendant in a rape case every fair opportunity to fight the charges against him. Rape shield laws cannot under any circumstances be applied in such a way as to deny a defendant the full constitutional right to confront his accuser. Why is the constitutional right to present a full defense so important? One reason is that the criminal trial process is far from perfect. Factually guilty people are sometimes not convicted of a crime they actually committed. And sometimes innocent people are convicted of crimes they did not commit. Just this year, a West Virginian who had been in prison for over 15 years on a rape charge was freed because of newly discovered DNA evidence. In the instant case, the trial court's ruling applying the rape shield law did not injure the defendant's right to a full defense. (Nevertheless, if I had been the trial court, I probably would have let the semen stain evidence in.) Trial courts must hold the defendant's need and right to present a full defense as sacrosanct, and must resolve all doubts in favor of that right. *Id.*

Guthrie and its progeny make it clear that the rape shield statute is expressly designed to yield to constitutional protections that assure fair trials with just outcomes. *Id.* By denying the Petitioner the opportunity to admit evidence of the diary / notebook, the Circuit Court has abused its discretion and denied the ability of the Petitioner to present relevant and material evidence essential to his defense.

C. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING EVIDENCE OF THE PETITIONER’S ILLEGAL NARCOTIC AND UNDERAGE ALCOHOL CONSUMPTION WITHOUT CONDUCTING A MCGINNIS HEARING

On September 9, 2010, the Petitioner filed his “request for notice of intent to use 404(b)

evidence.” [Appendix, page 34] In response thereto, on November 10, 2010, five days before trial the State filed its “motion to allow introduction of certain evidence, including 404(b) evidence.” [Appendix, page 12] In paragraph two of the State’s motion it refers to introducing evidence “in the form of testimony from the victim that the Defendant and his co-defendant were drinking alcohol and taking narcotics...” The State submitted that said evidence does not fall under Rule 404(b), but is simply part of the *res gestae* and completes the entire picture of what was happening at the time of the sexual assault. On November 10, 2010, the same day the State filed its motion, the Court admitted said evidence after a very brief hearing. [November 10, 2010 Motion Hearing Transcript at 15, line 16-18] At trial, M.S.B. testified in great detail how the Petitioner was “snorting pills.” [Trial Transcript at 180, line 3]

The Petitioner submits that a meaningful in-camera hearing should have been held to consider the admissibility of the illegal narcotic and underage alcohol consumption pursuant to *State v. McGinnis* and its progeny, *to-wit*; whether the evidence is offered for a proper purpose pursuant to Rule 404(b); whether the evidence is relevant pursuant to Rule 402 and Rule 104(b); whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice pursuant to Rule 403; and, if admissible, whether a proper limiting instruction was crafted. *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994); *Huddleston v. United States*, 485 U.S. 681 (1988)

Pursuant to the facts in the case *sub judice* and the charges as stated in the indictment it is evident that the illegal narcotic and underage alcohol consumption evidence should not have been admitted by the lower Court. Pursuant to the first *McGinnis* factor and the inclusionary nature of Rule 404(b), the Court nor the prosecutor could articulate a proper purpose for admitting the evidence. In its short analysis the Court stated, “I don’t think it’s 404(b) evidence.

I'm not really introducing it for any purpose, to show; it certainly is bad character or really for any of the other reasons, I don't think we really need to state any reason to introduce, other than it's just an essential part of what is going on" [November 10, 2010 Motion Hearing Transcript at 13, line 18-24]

In concluding that the evidence is admissible, the lower Court relied on *State v. Taylor*. Unlike the *Taylor* case cited by the lower Court, there is no nexus between the evidence proffered by the State and any material issues in the case *sub judice*. In *Taylor*, this Court reversed the Defendant's conviction for larceny given the "catastrophic" impact of the Defendant's drug use that was introduced into evidence by the State. *State v. Taylor*, 215 W.Va. 74, 593 S.E.2d 645 (2004) This Court reversed solely on the fact that the Court permitted the State to introduce too much evidence regarding the Defendant's drug habit. The *Taylor* Court recognized that there was at least a nexus between drug usage and motive to commit larceny. In the present case, there is no nexus between the Petitioner's illegal narcotic and underage alcohol consumption and alleged sexual assault and the prosecution was not at liberty to introduce other crime evidence beyond that necessary to explain or prove the crime charged in the indictment. *See State v. McArdle*, 156 W.Va. 409, 194 S.E.2d 174 (1973) (holding collateral evidence presented had no logical relevance to the murder trial and denied the defendant "fundamental principles of fairness.")

Pursuant to the second *McGinnis* factor, the illegal narcotic and underage alcohol consumption evidence was not relevant at trial as it did not have the "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *W.Va. R. Evid.* 401 For example, from a defense perspective, the Petitioner could not have used the evidence as a defense for voluntary

intoxication. On the other hand, the prosecution nor the Court manifested in any distinctive manner how the evidence was relevant other than the fact that it gives the “entire picture about what was going on on this evening that led to these alleged events.” [November 10, 2010 Motion Hearing Transcript at 13, line 10] The evidence had no nexus to the charge of sexual assault and did not have the tendency to make the existence of any fact of consequence more probable or less probable. The evidence was introduced by the State for abusive and illegitimate purposes. Proof of the Petitioner’s illegal narcotic or alcohol addiction or consumption could not possibly constitute evidence of motive as in *State v. Taylor*, or any of the other legitimate 404(b) reasons.

Pursuant to the third *McGinnis* factor, it is absolutely clear that the probative value of the narcotic and underage alcohol consumption evidence is substantially outweighed by unfair prejudice. Pursuant to Rule 403, “[u]nfair prejudice does not mean damage to a defendant’s case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.” *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996) In *State v. Taylor*, this Court stated, “[o]n occasion, the courts have commented that certain categories of crimes can create severe prejudice; by their very nature, these crimes can be highly and unusually inflammatory. The courts have included the following crimes in that category ... narcotics offenses” *State v. Taylor*, 215 W.Va. 74, 593 S.E.2d 645 (2004) The *Taylor* Court further elaborated by stating, [w]e concur with the recognition of the California Supreme Court that “[t]he impact of narcotics addiction evidence ‘upon a jury of laymen [is] catastrophic It cannot be doubted that the public generally is influenced with the seriousness of the narcotics problem ... and has been taught to loathe those who have anything to do with illegal narcotics in any form or to any extent.” Citing *People v. Cardenas*, 647 P.2d 569 (1982)

“We are not alone in agreeing with this view for the New Jersey Appellate Division has said that “the prejudicial nature of the evidence [of drug use] is particularly self-evident and overwhelming. It is difficult to conceive of anything more prejudicial to a defendant than presenting him to the jury as a drug addict[.]” *Taylor* at 80; Citing *State v. Mazowski*, 766 A.2d 1176 (2001) Clearly, the probative value of the narcotic and underage alcohol consumption evidence to give “the entire picture” was so slight, the trial court could not, without abusing its discretion, find that the prejudicial effect of the evidence did not substantially outweigh its probative value. *See State v. Wyatt*, 198 W.Va. 530, 482 S.E.2d 147 (1996) (holding “even if some justification is presumed from the record before us for such evidence, its highly prejudicial effect would far outweigh any probative value [under] Rule 403, W.Va. R. Evid.”

Pursuant to the fourth *McGinnis* factor, the Court failed to read a limiting instruction at the time the illegal narcotic and underage alcohol consumption evidence was offered or in the trial court’s general charge to the jury.

In balancing the *McGinnis* factors, the facts militate in favor of the Petitioner. The trial court abused its discretion by admitting the narcotic and underage alcohol consumption evidence without articulating a proper purpose. More importantly, the probative value of said evidence was substantially outweighed by unfair prejudice to the Petitioner. To compound the matter further, the Court erred by failing to include a limiting instruction. The likelihood that the jury convicted the Petitioner because of his character and not because of the evidence surrounding the alleged sexual assault is great.

D. IT WAS CLEARLY ERRONEOUS FOR THE TRIAL COURT TO FIND THE INFORMATION CONTAINED WITHIN THE FOUR CORNERS OF THE AFFIDAVIT AND COMPLAINT FOR SEARCH WARRANT WAS SUFFICIENT TO SUPPORT PROBABLE CAUSE TO ISSUE THE AUGUST 3, 2010 SEARCH WARRANT PERMITTING DEPUTY VEACH TO SEARCH THE CONTENTS OF THE PETITIONER’S COMPUTER

On May 2, 2010, Deputy Veach arrested the Petitioner inside his grandmother's residence in Burlington, West Virginia. While inside the residence, Deputy Veach secured a laptop computer with the Petitioner's permission and subsequently applied for a search warrant on August 3, 2010 to look at the contents on said computer. [September 24, 2010 Motion Hearing Transcript at 6, line 2-25, Appendix, page 17] After examining the computer, Deputy Veach discovered several pornographic files that were created on April 29, 2010, just four days prior to the Petitioner's arrest. Upon oath and affirmation, Deputy Veach stated the following written facts within the four corners of the search warrant as the probable cause basis for the warrant, *to-wit*;

On November 6, 2009, Miranda Scott Bourne stated she was raped by Jonathan Scott Bourne and Kilton Lee Kitchen around August, 2006. A warrant was issued for both subjects [on May 2, 2010]. When deputies served the warrant on Jonathan, the computer was observed. Jonathan advised deputies could take the computer for investigative purposes. A search warrant is needed to view the contents of the computer held at our office.

In response to the prosecuting attorney's questioning on direct examination regarding what the officer told the Magistrate while applying for the search warrant at the September 24, 2010 suppression hearing, Deputy Veach stated the following, *to-wit*; "[b]asically I thought that there may be some things that was on the computer that may relate to the case." [September 24, 2010 Motion Hearing Transcript at 10, line 10] Without pointing to specific facts in the case *sub judice* or to documented statistics, the State made a general conclusory argument that there is often a correlation in sex cases and evidence in the form of files, videos or photographs located on a computer. [September 24, 2010 Motion Hearing Transcript at 19, line 8-23] After considering the search warrant itself and the arguments of the parties, the Court admitted the pornographic files discovered on Petitioner's computer. [September 24, 2010 Motion Hearing

Transcript at 19, line 8-23]

The Fourth Amendment provides that a warrant may be issued only upon probable cause, supported by oath or affirmation. Probable cause exists if the quantity of facts and circumstances provided to a magistrate in a written affidavit are sufficient to warrant the belief of a prudent person of reasonable caution that a crime has been committed and that the specific fruits, instrumentalities, or contraband from that crime presently may be found at a specific location. *State v. Lilly*, 194 W.Va. 595, 461 S.E.2d 101 (1995) An adequate showing of probable cause requires specific and concrete facts, not merely conclusory speculations. *Id.* It is clear that the facts set forth by Deputy Veach in the search warrant are “bare bones” and merely conclusory speculations. Deputy Veach was acting on a mere hunch, which certainly does not rise to the level of probable cause. At no point did M.S.B. provide in her three page written statement on November 3, 2009, that the Petitioner or his co-defendant took pictures, videos or provide other facts that would warrant a reasonable person to conclude that Petitioner’s computer would contain specific items related to the alleged rape in 2006.

A staleness issue compounds the probable cause determination even further in the case *sub judice*. The gap between the alleged commission of the crime and the presentation of the affidavit to the magistrate was approximately four years. Furthermore, the facts as contained in the transcripts do not indicate whether the Petitioner owned the computer that is at issue in 2006.

When analyzing whether an affidavit for a search warrant under the Fourth Amendment has become stale, the timeliness of the information supplied depends on the circumstances of the case, including the nature of the crime under investigation. The freshness of information is determined by a test that takes into account not just the passage of time but the totality of the

circumstances of each case, including the type of crime involved, and the nature of the items sought.

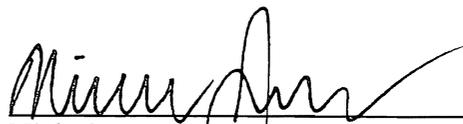
The lapse of time is very important, as the property is likely to be destroyed or no longer present. In the case *sub judice*, the investigation focused on the contents of the Petitioner's computer after he was arrested. According to the victim, the alleged rape occurred approximately four years prior to the Petitioner's arrest. The fact that a rape was alleged to have occurred some time in the past does not automatically justify the issuance of a warrant authorizing a search of the Petitioner's computer approximately four years later. The facts offered as the premise for the warrant do not engender a reasonable belief that, at the time Deputy Veach applied for the search warrant on August 3, 2010, evidence relating to the alleged 2006 rape was on the Petitioner's computer. The facts occurred too far in the past to meet the timeliness standard to believe specific fruits of the crime presently may be found on Petitioner's computer and are said to be "stale" and did not justify issuance of the search warrant.

VIII. **CONCLUSION AND RELIEF REQUESTED**

WHEREFORE, for all the reasons set forth above, the Petitioner prays for the following relief from this Honorable Court:

1. A hearing.
2. That the Court reverse the Petitioner's conviction for the charges in this Petition;
3. That the Court expunge the Petitioner's criminal record to show no conviction and no arrest for the charges in this Petition;
4. That the Court release the Petitioner from confinement or, in the alternative, set a bond;
5. That the Court grant Petitioner a new trial;
6. That the Court grant any further relief that it deems necessary.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of June, 2011, I served a copy of the foregoing

Petitioner's Brief on the following by U.S. Mail, postage prepaid:

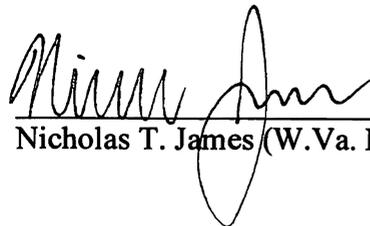
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