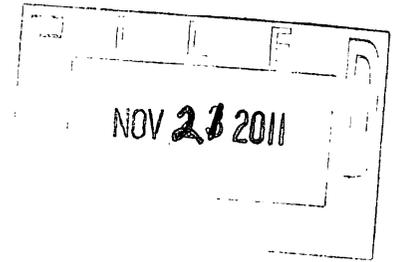


NO. 11-0282
IN THE SUPREME COURT OF APPEALS
OF
WEST VIRGINIA



CHARLESTON, WEST VIRGINIA

STATE OF WEST VIRGINIA

Plaintiff Below, Appellee

v.

JONATHAN SCOTT BOURNE

Defendant Below, Appellant

REPLY BRIEF

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COMES NOW the Appellant, Jonathan Scott Bourne, by counsel Nicholas T. James, pursuant to Rule 10(g) and accordingly replies to the Summary Response to Petition For Appeal.

Charles Edward L.

A. The rationale for admitting lustful disposition evidence as held in *Charles Edward L.*, clearly does not apply in the case *sub judice*. It is readily apparent that the Court in *Charles Edward L.* was solely concerned with the credibility and weight a jury would give to a child victim. After juxtaposing the perceived credibility and weight a jury may give to the testimony

of a child victim and an adult defendant, the *Charles Edward L.* Court felt it was necessary to admit lustful disposition evidence to “even the playing the field.” *State v. Edward L.*, 183 W.Va. 641 (1990)

At the time of the alleged crime in the case *sub judice*, Jonathan Bourne just turned twenty years old and M.S.B. was a thirteen year old high school student. The fact that Jonathan and M.S.B. are of the same cohort, a parent-child relationship is not involved and the two are half-siblings all militate against the rationale in *Charles Edward L.* Under the circumstances, the credibility issue is moot and the probative value of admitting the pornographic¹ domain name evidence was substantially outweighed by the danger of unfair prejudice.

Rape Shield

B. As stated by the Court in *Guthrie*, the rape shield law should be raised in a manner consistent with its purpose. *State v. Guthrie*, 205 W.Va. 326 (1999) The Petitioner agrees that the purpose of the rape shield law is to give “rape victims heightened protection against harassment, and unnecessary invasions of privacy.” *Id.* The Petitioner does not agree with the position of the State that the rape shield law bars every conceivable instance of an alleged victim’s sexual conduct. *Guthrie* makes it clear that a due process analysis must be made to determine whether proffered evidence under the rape shield statute is properly excluded.

The State submits the excluded diary evidence in no way, shape or form “had any tendency to disprove that the petitioner held (M.S.B) down and forcibly raped her in their grandmother’s basement.” The lower court stated that the diary evidence “was just notes in a notebook used by her (M.S.B.) and a friend of hers and it did not relate to her story. It just

¹ Of the eight domain name files discovered on the computer, only four could be opened and viewed. Thus, it is unknown what content was contained on the four files. [November 10, 2011 Pre-Trial Hearing Transcript, page 8, line 23]

related to some other instances that were not really relevant to her testimony.” [December 13, 2010 Transcript, page 6, lines 8-11.] Petitioner respectfully disagrees.

The law in this State is very clear that a Defendant may be convicted in a sexual assault case based solely upon the uncorroborated testimony of the victim, unless such testimony is inherently incredible. *State v. Beck*, 167 W.Va. 830 (1981) Due to the fact that there was no corroborating physical evidence to support the allegations of M.S.B. and that Jonathan could be convicted on her statement alone, it was absolutely imperative that the diary come into evidence to attack the credibility of M.S.B. Once admitted, the jury as the finder of fact could then give the evidence whatever weight it feels it deserves. The diary evidence was not intended to harass or to unnecessarily invade on the privacy of M.S.B. The diary evidence was intended to impeach M.S.B’s initial report that Jonathan Bourne took her virginity. Having excluded the diary, the Defendant’s Constitutional right to a fair trial and due process was substantially trumped.

Narcotic and Alcohol Evidence

C. Jonathan Bourne was on trial for sexually assaulting his step-sister. Jonathan was not on trial for possessing or consuming illegal narcotics or underage drinking. The narcotic and drinking evidence was not relevant to any single element of any of the charges contained in the indictment. There is no nexus between drug and alcohol consumption and the motive to commit a sexual assault. In other words, the evidence did not have the tendency to make the existence of any fact of consequence more probable or less than it would without the evidence. Furthermore, the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. In *Taylor*, the Court warned of the highly inflammatory and prejudicial effect narcotic offenses may have on a jury. *State v. Taylor*, 215 W.Va. 74 (2004) A meaningful *McGinnis* hearing was required to safeguard Jonathan Bourne’s right to a fair trial. In the alternative, said

evidence should have been excluded pursuant to Rule 403 of the West Virginia Rules of Evidence as the probative value is substantially outweighed by the danger of unfair prejudice. As the Court stated, “[a]nd I don’t think it’s really is 404(b) evidence. I’m not really introducing it for any purpose, to show; it certainly is bad character...” [November 10, 2010 Pre-Trial Transcript, page 13, line 20] The lower court acknowledged the evidence had no purpose, and also acknowledged that the evidence “certainly is bad character.” Accordingly, the lower court committed reversible error by failing to exclude the evidence pursuant to Rule 403 under a simple balancing test.

Invalid Warrant

D. The State argues that once Deputy Veach seized Jonathan Bourne’s computer a search warrant was not necessary to search the contents. Petitioner respectfully disagrees. *State v. White* is distinguishable from the case *sub judice*. In *White*, law enforcement obtained a search warrant to search a truck for “evidence of a crime.” *White*, 227 W.Va. 231 (2011) During the execution of the warrant, police seized a cellular telephone and subsequently searched the contents of the phone without a subsequent warrant. The *White* Court specifically held, “when searching a vehicle pursuant to a valid search warrant, no additional search warrant is required to examine the contents of items that are properly seized in the execution of the warrant...” *Id.*

Unlike *White*, Jonathan’s computer was not seized pursuant to an initial search warrant. Furthermore, the specific holding in *White* limits its application to vehicles searched pursuant to a valid search warrant. Had the Court intended to broaden its holding to other scenarios it would have clearly stated such. A valid search warrant was necessary to safeguard Jonathan’s Fourth Amendment right against unreasonable search and seizures since the computer was not initially seized pursuant to a warrant. Although Jonathan gave Deputy Veach verbal consent to take the

computer, he did not consent to the search of the contents. Jonathan had a legally protected reasonable expectation of privacy regarding the contents on the computer.

Assuming *arguendo* that *White* is not limited to just vehicle searches, it is clear that a “valid” search warrant is still a condition precedent before a law enforcement officer can search the contents stored on a phone (in the case *sub judice* a computer). The search warrant obtained by Deputy Veach is invalid as the information contained within the four corners of the affidavit and complaint for search warrant is not sufficient to support probable cause. When questioned by the prosecuting attorney at the September 24, 2010 suppression hearing, Deputy Veach stated, “basically I thought that there may be some things that was on the computer that may be related to the case.” [September 24, 2010 Motion Hearing Transcript at 10, line 10] The information Deputy Veach possessed was nothing more than a mere hunch and conclusory speculation. As stated in *State v. Lilly*, an adequate showing of probable cause requires specific and concrete facts, not merely conclusory speculations.” *Lilly*, 194 W.Va. 595 (1995)

WHEREFORE, for all the reasons set forth above and in the Petitioner’s Brief, this Honorable Court should grant the relief previously prayed for.

**JONATHAN SCOTT BOURNE
BY COUNSEL**



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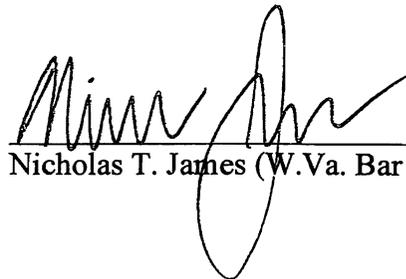
CERTIFICATE OF SERVICE

I, Nicholas T. James, Counsel for Jonathan Scott Bourne, do hereby certify that I have served a true copy of the **REPLY BRIEF** upon counsel for the Respondent by depositing said copy in the United States mail, with first-class postage prepaid, on this 18th day of November, 2011, addressed as follows:

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