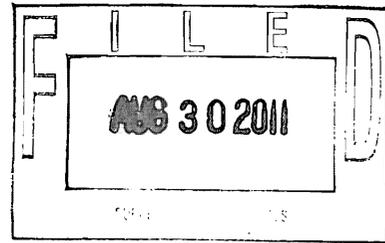


BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THOMAS McBRIDE, WARDEN,
MOUNT OLIVE CORRECTIONAL
COMPLEX

Petitioner,



v.

No. 11-0853

JOSEPH H. LAVIGNE, JR.

Respondent.

APPEAL FROM A FINAL ORDER
OF THE CIRCUIT COURT OF PUTNAM COUNTY (99-C-223)

BRIEF OF THE PETITIONER

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I. TABLE OF AUTHORITIES

SUPREME COURT OF APPEALS OF WEST VIRGINIA

State ex rel Stephen P. Bowers v. Thomas Scott, Administrator, South
Western Regional Jail, 226 W.Va. 130, 697 S.E.2d 722 (W.Va. 2010)
State v. Harry E. Beck, 167 W.Va. 830, 286 S.E.2d 34 (W.Va. 1981)
State v. Greene, 260 S. E.2d 257 (W.Va. 1979)
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State ex rel Hall v. Liller, 207 W.Va. 696, 702, 536 S.E.2d 120, 126 (W.Va. 2000)
State v. O'Connell, 163 W.Va. 366, 256 S.E.2d 429 (W.Va. 1979)
State v. Riley, 201 W.Va. 708, 714, 500 S.E.2d, 524, 530 (W.Va. 1997)
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State v. Broughton, 196 W.Va. 281, 473 S.E.2d 413 (W.Va. 1996)

UNITED STATES SUPREME COURT

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423 U.S. 824, 96 S.Ct. 38 (1975)
United States v. Henry, 560 F.2d 963, 965 (9th Circuit 1977)
Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213 (1948)

WEST VIRGINIA STATUTES

West Virginia Code 53-4a-9

WEST VIRGINIA RULES

Rule 403 of the West Virginia Rules of Evidence
Rule 608 of the West Virginia Rules of Evidence
Rule 19 of the Rules of Appellate Procedure
Rule 21 of the Rules of Appellate Procedure

II. ASSIGNMENTS OF ERROR

1. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY FINDING THAT THE USE OF A JURY INSTRUCTION VIOLATED THE RESPONDENT'S CONSTITUTIONAL RIGHTS.
2. THE CIRCUIT COMMITTED REVERSIBLE ERROR WHEN IT RULED THAT THE TRIAL COURT'S DECISION TO LIMIT THE RESPONDENT TO FOUR CHARACTER WITNESSES DENIED THE RESPONDENT HIS CONSTITUTIONAL RIGHT TO PRODUCE EVIDENCE IN HIS DEFENSE.
3. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY RULING THAT THE CONVICTION SHOULD BE REVERSED AND REMANDED FOR A NEW TRIAL BASED ON A FINDING OF INSUFFICIENT EVIDENCE.

III. STATEMENT REGARDING ORAL ARGUMENT

The Petitioner contends that oral argument is necessary in this case. The Petitioner contends that the oral argument in this case should be subject to Rule 19 of the Rules of Appellate Procedure. The Petitioner contends that the case is appropriate for a Rule 19 argument in that the Petitioner claims that the Circuit Court engaged in an unsustainable exercise of discretion and where the law governing that discretion is settled, and that the Circuit Court's ruling dealt with a claim of insufficiency of evidence against the weight of the evidence of the case. Also the Petitioner contends that the case involves assignments of error in the application of settled law. The Petitioner contends that the case is not appropriate for a memorandum decision. Rule 21 of the Rules of Appellate Procedure states that a memorandum decision reversing the decision of the Circuit Court should be issued in limited circumstances and due to the complexity of this case it would be difficult for this Honorable Court to provide a concise

statement of their reasoning for a reversal.

IV. STATEMENT OF THE CASE

The Respondent, Joseph H. Lavigne, Jr., on November 20, 1996, was convicted of sexual assault in the first degree, sexual abuse resulting in bodily injury, and incest of his daughter. Mr. Lavigne had exhausted his direct appellate rights after trial and initiated a habeas proceeding in 1999. On February 6th and 7th, 2010, an omnibus hearing was held in the Circuit Court of Putnam County. Judge Spaulding on April 29, 2011, issued a ruling in which he vacated the convictions of Mr. Lavigne and granted Mr. Lavigne a new trial.¹ The Circuit Court's ruling was based on three (3) issues. The Circuit Court found that a jury instruction was inappropriately given, it found that the trial Judge abused his discretion by only allowing four (4) character witnesses to testify on behalf of Mr. Lavigne, and finally the Circuit Court determined that the evidence as a matter of law was insufficient to support the convictions.

West Virginia Code, Chapter 53, Article 4a, Section 9, gives the Petitioner the right to appeal this final judgment entered by a Circuit Court. According to the case of State ex rel Stephen P. Bowers v. Thomas Scott, Administrator, South Western Regional Jail... 226 W.Va. 130, 697 S.E.2d 722 (W.Va. 2010), this Honorable Court stated that in reviewing challenges to the findings and conclusions of the Circuit Court in a habeas corpus action, the Supreme Court of Appeals applies a three prong standard of review: it reviews the final

¹The Petitioner will refer to the Court ruling that is the subject of this appeal as "The Circuit Court ruling" to avoid any confusion with the trial Judge's rulings (Judge Clarence L. Watt). The Petitioner will refer to the judicial rulings made by the Honorable Clarence L. Watt as the Trial Court rulings).

order and the ultimate disposition under the abuse of discretion standards; the underlying factual findings under a clearly erroneous standard; and the questions of law are subject to de novo review.

V. STATEMENT OF THE FACTS

As stated in the Circuit Court's opinion, in the early morning hours of Sunday, February 11, 1996, a five year old child, hereafter designated as K.L., was carried from the recreation room of her home located in Putnam County, West Virginia. According to the child's statement she was taken across the street to a church parking lot, was told to take her clothes off, and then was brutally sexually assaulted. The sexual assault literally ripped the child's vaginal area, and the damage was so extensive that it required reconstructive surgery. TT. Vol.1, page 213. According to the child's statement she was left bloody and with a gapping wound in her vaginal area. According to her statement the assailant picked up her clothes and then went behind a church, and she stated that she ran back to her home. Once inside the child stated that she returned to the playroom area where she had slept the night before and laid down next to her sleeping brother.

Government officials first notification of the crime was due to a 911 emergency call placed by the Respondent, Mr. Lavigne, to the Putnam County Emergency Communications Center. The 911 telephone call was recorded, and the recording was played to the jury in the Respondent's criminal trial. According to the 911 tape, the Respondent, Mr. Lavigne, called the emergency communications center on the morning of February 11, 1996, during the early morning hours. According to the 911 tape Mr. Lavigne said to the 911 operator, "ah woke up this morning and found my daughter in the bathroom. She is

bleeding from the vagina. She says that someone who looks like me, ah, took her over to the parking lot and ah hurt her. 911 operator: raped her? Mr. Lavigne: ah we think so. She's five."

TT. Vol.1, page 185.

During this 911 call the Respondent, Mr. Lavigne, on at least five (5) separate occasions informed the 911 operator that the child was accusing him of being the rapist.

Mr. Lavigne stated to the 911 operator,

"when I got up I was helping her clean up.she told us about, that someone, she thought it was me, took her outside to the parking lot, and made her sit out there."

TT. Vol. 1, page 186. At another time during the 911 call Mr. Lavigne said to the operator,

"and you should be able to get a good description (of the assailant) she (the victim) says it looks just like me. She thought it was me, that's why we figured she really didn't want to talk to us at first..."² TT. Vol. 1, page 187.

The 911 tape then indicates a voice in the background of the Respondent saying, "we found the door open." The evidence in the case would indicate that that voice in the background was the Respondent's wife. TT. Vol. 1, page 187. Later during the 911 call the Respondent said to the 911 operator,

"yes. Actually she said it was me to start with. (child crying in the background) So, ah I suppose someone is going to have to investigate or somethin."

TT. Vol. 1, page 189. Later on during the 911 call the Respondent then volunteered to the 911 operator that he did not see any other marks on her (outside of the damage to the vagina) and then said again,

"she thought it was me. She got carried out of the house is what she said to

²Facts of the case clearly indicate that when the child returned to the home after the rape, she did not go to her parents for help, but chose to lay down next to her brother.

us.”

TT. Vol. 1, page 190.

Therefore, it is obvious from the 911 tape that the Respondent had a preoccupation with the fact that his daughter, the victim of this brutal rape, was identifying him as the rapist. Mr. Lavigne’s mental preoccupation was extensive enough that he brought it up to the 911 operator on at least five (5) occasions in a phone call that just lasted a very few minutes.

After the 911 call was placed by the Respondent to Putnam County authorities the Putnam County 911 Communications Center dispatched law enforcement and emergency medical services to the child’s home. During the trial the State of West Virginia called paramedic Frank Stover to the stand to testify. Mr. Stover testified that when his ambulance arrived at the scene he was met by a gentleman who was the Respondent, Mr. Lavigne. He said that Mr. Lavigne told him that he found the little girl in the bathroom and she was bleeding from her “bottom” and that she had originally said that she hurt herself pooping. TT. Vol. 2, page 419. The paramedic then spoke to the child’s mother, Jamie Loughner, and she stated that she had put the child in the bathtub to clean her up. And stated that when she was washing her in the shower that she had noticed blood coming from the child’s vagina. TT. Vol. 2, page 422. The paramedic stated that he then spoke with the child who was sitting on the couch holding a blanket around her. He stated that he asked the child what happened to her, he stated that the child, K.L., stated a man that had the same kind of clothes that her daddy was wearing. TT. Vol. 2, page 424. Before the child could continue the paramedic said that the Respondent’s wife, Mrs. Lavigne, kept interrupting her. “You know, we were asking questions. She (Mrs. Lavigne) just kept emphasizing over and over by saying honey it couldn’t have been your daddy, daddy was in

bed with me". The paramedic said that this happened every time the child would talk. TT. Vol. 2, page 425. At one point the paramedic testified that after the mother stopped the child from talking, the mother stated "honey it couldn't have been your daddy because he was in bed with me.", and the child said, "well he sure looked like my daddy." the mother then said, "remember you said the man had on green pants." and the child, "no mommy they were just like daddy has on." TT. Vol. 2, page 426.

The paramedic then stated that he spoke with the child again when she was located in the back of the ambulance prior to be transported to the hospital. TT. Vol. 2, page 428. Paramedic Stover stated that he asked the child how she got back home and the child said, "I came in the back door". The child's mother then interrupted and said "remember he (the rapist) came in the front door and carried you out the front door naked, or back to the front door naked." The victim child then said, "no mommy, daddy carried me out the back door. I ran back in that door after daddy hurt me." TT. Vol. 2, page 429.

The paramedic stated that then they started to take the child to Women and Children's Hospital in Charleston and while in route the mother, i.e. the wife of the Respondent, kept saying to the child, "just remember, just because the man looked like your daddy doesn't mean that it was your daddy. Besides, you told me that he was wearing green pants and your daddy does not have green pants." The child started crying and was very very agitated and told her mother that "daddy hurt me with his pp" and then the mother just kept saying but daddy was in bed with me. TT. Vol. 2, page 430.

The State of West Virginia also during the trial called another paramedic who was involved in the case named Franklin Humphreys. TT. Vol. 2, page 502. During Mr. Humphreys' testimony he was asked by the State if he had had any conversation with the child victim or the child's mother during the period of time that he was involved in the case.

He stated that he had a conversation with the child and asked the child what was wrong what had happened. TT. Vol. 2, page 504. The paramedic stated that the child at first appearance said that the man who looked like her father had come in and taken her outside, and took me over to the she said she believed the playground, and put his pp in her pp and hurt her. He stated that when he was talking to her while she was with her parents she would say a man who looked like my father or my daddy was the offender. But when she was not with her parents, she referred to the person that raped her as my daddy. TT. Vol. 2, page 505. Mr. Humphreys stated that in the back of the ambulance just after the father had stepped out of the ambulance, a police officer came over and asked her what happened. She started by saying my daddy took me over and she referred to him as my daddy until the mother got in the ambulance and started telling her that it couldn't be her daddy that it just looked like her daddy. TT. Vol. 2, page 505.

When the child arrived at Women and Childrens Hospital she was seen by her family doctor, Dr. Joan Phillips. Dr. Phillips was called by the State to testify in the criminal trial. Dr. Phillips said that she had a personal relationship with the child and that she had been the child's treating pediatrician in the past and that she had an opportunity to talk to K.L. about what had happened. She said after asking her about what had happened she said the child stated that a man, and her quote was, "that looks like my daddy", Dr. Phillips stated that the inflection in her voice that if it wasn't it sure looked like my daddy. She said she stated "it really looked like my daddy, carried me outside to the church parking lot." She stated that the child stated that she was asleep in the family room and stated that "he woke me up and carried me outside to the church parking lot." She stated that "he put me on the grass, took off my pants, and put his pp in mine." TT. Vol. 1, page 205. She stated that the man who raped her had on green pants and a shirt that "looked like my daddy's". TT. Vol.

1, page 206. She told Dr. Phillips that she told the man to stop, she stated that he took my clothes off, and stated that after the man was finished that she ran home. The child stated to Dr. Phillips that she then laid down under the blanket at her brother's feet and then she said she went upstairs to the bathroom to get a nightgown and towel. Dr. Phillips asked her if she had woke up her parents when she returned to the house and she said no she did not and she did not go into their room. She said she tried to clean herself up without asking them for help. TT. Vol. 1, pages 206 and 207. Dr. Phillips said that when she had asked the child if she had seen the man that raped her before, that the child had a change in demeanor. That the child diverted her eyes and commented that to this point she wouldn't really give good eye contact. And it was just the body language. She diverted her eyes and she indicated no. TT. Vol. 1, page 207.

Dr. Phillips' testimony was that after a physical examination that they found that there was a sever laceration that went the entire floor of the vagina and disrupted the hymen, basically she said that the whole area was gapping and it had bleed. It was oozing still, there were blood clots in the wound area. TT. Vol. 2, page 13. Dr. Phillips stated that during her years of experience that K.L.'s injuries were the most extensive vaginal injuries she has ever seen. TT. Vol. 1, page 219.

The State of West Virginia also called a witness to testify in the criminal trial, being Kimberly Martin. She stated that she was a physician at Women and Children's Hospital in Charleston and that she had worked with Dr. Phillips on the case regarding K.L.

Dr. Martin testified that she was talking to K.L. about what had happened to her that day. Dr. Martin testified that when she asked the child to describe the person that committed this rape, the child said, "it looked like my daddy. And she said he had green pants and he had a gray shirt with black dots on it and she told us that if she had said

anything that the man would spank her.” TT. Vol. 2, page 680. Dr. Martin said that she and Dr. Phillips had asked the child if she had seen the person that hurt her before and said that at that point the child would not look at them. They said the child would just look down and shake her head no. They said the child was very calm and very articulate and verbalized very well. TT. Vol. 2, page 684.

Dr. Martin then went on to testify that she witnessed a conflict that occurred between the child and the child’s mother who was the wife of the Respondent. She stated, “I not only witnessed it, I actually was a part of it.” TT. Vol. 2, page 685. She stated that there were three (3) of us discussing the matter and the conversation ended up into a period of quiet argument between the child and her mother. The doctor stated that the child had turned to her mother and was very adamant. She said it was daddy. He was wearing green pants. And the mother said it could not have been your daddy. He doesn’t have green pants. But the child was adamant, she would not back off. She repeatedly told her mother that it was daddy. The doctor said that the child continued to say that it was daddy and the mother became frustrated. You could see she was becoming very frustrated with the argument and that the mother looked over at the doctor at that time and insisted that the doctor leave the room. After the doctor and mother left the room, the doctor stated that the mother began to explain to her a theory of why the father could not have done it in that the mother claimed to be such a light sleeper that he could not have gotten out of the bed without her being aware of it. TT. Vol. 2, page 686.

The State of West Virginia called Officer Ron Smith to testify who was the lead investigating officer. Officer Smith stated that he first met the child laying on a cot in the back of the ambulance. TT. Vol. 2, page 534. He testified that he asked her if she could tell him what happened and she nodded her head that she could. He said that the child

looked at him in the eyes and said her daddy picked her up, carried her out across the street to the church parking lot and hurt her. The officer stated I asked her how he hurt her and the child said that "daddy told me that if I didn't take my clothes off he was going to spank me." The officer testified that the child said that daddy helped her take her clothes off and he took his pants off and put his pp in her pp and she pointed down to her vaginal area. TT. Vol. 2, page 535. Officer Smith testified that he asked what the individual again looked like and she said just like my daddy. TT. Vol. 2, page 535. The officer said that the child then stated that after the rape that he daddy picked up the clothes and carried them behind the other church, and then got up and ran back to the house. TT. Vol. 2, page 536.

Officer Smith testified that while he was in back of the ambulance talking to the child that a lady got in the ambulance and told him that her name was Jamie Loughner, the mother of the child. The officer stated that while the mother got in the ambulance that the child was in the middle of telling the officer what had happened. He said Mrs. Loughner then interrupted the child and said there is no way it was your daddy. Your daddy was in bed with me. The officer said that the child told her mother if it wasn't my daddy it was a man that looked just like my daddy and he's got the shirt on my daddy has on now. The officer stated that he told the mother that the last thing the child needed right now was not to be believed and that it would be best to talk about something else. He informed the mother that he would be to the hospital to talk to the child in a little bit. TT. Vol. 2, page 537.

The officer stated that he interviewed the Respondent, Mr. Lavigne. That Mr. Lavigne stated that he got up and found the child in the bathroom with a towel cleaning herself. Mr. Lavigne said that the child had told him that she had pooped and that he had discovered that she was bleeding from her vaginal area. Officer Smith testified that the Respondent, Mr. Lavigne, stated that the child kept telling him that he, the father, carried

the child outside to the church parking lot and Mr. Lavigne said that the child said to the mother the same thing.

Officer Smith testified that Mr. Lavigne, the Respondent, said that after they had discovered that the child's vaginal area was bleeding that they (he and his wife) talked for a while and then they decided to call 911. Mr. Lavigne acknowledged that he told his wife you know that there's going to be an investigation and her response was I know I know. TT. Vol. 2, page 546.

During the trial the child's mother, Jamie Loughner, was called to testify on behalf of the State. She testified that on the morning of the rape that the child had told her that daddy had taken her to the church parking lot and hurt me. TT. Vol. 1, page 285. She also stated that the child told her that daddy took me over to the church parking lot and stuck his pp in mine or something to that affect. TT. Vol. 1, page 286. The mother then also testified that as this discussion was taking place that she made an evaluation that daddy could not have done this. She based this upon the fact that she was a light sleeper and it would be impossible for daddy to have left the bed to have done this without awakening her and she felt that the child in some way must have been confused in her mind between the husband as the perpetrator as compared to an intruder. TT. Vol. 1, page 287.

During the trial the defendant/Respondent, Joseph Lavigne, elected to take the stand to testify in his own behalf. He testified that he had woken up at 7:30 in the morning and had to use the bathroom and he heard his daughter, K.L., outside and it sounded like she was crying. When he said he saw her he saw brown material on her leg that looked like blood and she was shivering and crying. TT. Vol. 3, page 814. He testified that he noticed that the front door was open and then he said that when he asked the child questions she said well daddy picked me up and carried me outside and I said I couldn't have carried you

outside I was sleeping and then the child went on to say well my daddy carried me outside and hurt me and she was looking at me. TT. Vol. 3, page 816. He then testified that he went and put his clothes on and went outside to the parking lot and at that point we asked her where it happened and she indicated close to the church. He stated that he went out to see if he could locate the guy or any evidence. He said that when he stepped onto the parking lot he realized that the child was identifying him and that he was going to be questioned basically. TT. Vol. 3, page 816. He stated that he then went back into the house and that his wife at that point had moved the child to a couch and he had talked to his wife regarding the matter and then they concluded that they needed to call 911. TT. Vol. 3, page 817.

During Mr. Lavigne's testimony he was asked if during the police interrogation he was asked the question well could you have done this, i.e., the rape, he stated that his answer was, "well if I had done this I don't remember doing it." He was then asked if he explained that answer in more detail and he stated that he said the following to police. "At one point when they asked me that and I realized that they were actually looking at me and not anybody else, no I didn't do this. If I did it, I don't remember doing this." "If I had done this, it had to have been in a fugue state, which is like driving down the road and you don't remember the last five miles, but I didn't. I didn't do it. I didn't do this, there is no way I could do this..." TT. Vol. 3, page 825.

The State of West Virginia called Officer Steve Young to testify who is affiliated with the Hurricane Police Department. Mr. Young's version of the conversation with Mr. Lavigne was, "Did you ask point blank ask Mr. Lavigne if he had done this to his daughter." Officer Young said yes. The Prosecutor then asked what was Mr. Lavigne's response. Officer Young testified that Mr. Lavigne said, "that if he had done it he would not remember it." TT.

Vol. 2, page 513.

During the trial the State called the victim of the case, K.L., to the stand to testify. The evidence during the trial was that at this point K. L. Was six (6) years old. TT. Vol. 1, page 245. During the child's testimony she seemed to be extremely intelligent and bright, but very selective as to what areas of questioning she was willing to cooperate with. TT. Vol. 1, pages 245-263. During the direct examination questioning she was asked by the Prosecutor if she was basically tired of talking about the case and that she nodded in the affirmative. The Prosecutor asked her do you remember going to the hospital and she shook her head yes. TT. Vol. 1, page 247. She was asked by the Prosecutor if she remembered at the hospital telling Dr. Joan (Dr. Joan Phillips) a lot of stuff and she nodded her head in the affirmative that she did remember telling Dr. Phillips information. She was asked if she told Dr. Phillips the truth that day and she nodded that she did in the affirmative. She was then asked why did she go to the hospital and her answer was because she was raped. TT. Vol. 1, page 248. She was asked by the Prosecutor if she remembered being outside the day she got hurt and she nodded that she did. She was asked did she remember where it was that she got hurt and she nodded her face that she did in the affirmative. She was asked where was it she said "across the street." She was asked is anything over there and she said "church parking lot." She was asked if there were any bushes there and she answered "trees". She was asked did you know what kind of trees they are and her answer was "pine". The Prosecutor then said pine trees, do they have little needles on them and her answer was "yes". She was asked by the Prosecutor if she remembered what she did after she got hurt, what did you do, did you go to the store, did you go home, what did you do, and her answer was "I went home". TT. Vol. 1, page 249. She was asked if the person that hurt her took something from her and she said "they

took my clothes". TT. Vol. 1, page 252. She was asked how did she get back to her house and she said that she walked. TT. Vol. 1, page 252. She was asked what her brother was doing when she got back she said that he was sleeping and snoring. TT. Vol. 1, page 252. The Prosecutor then basically attempted to have her identify the individual that assaulted her and asked, "and we need to know, really, who did this to you do you remember", her answer was "I don't know." Do you know, have you ever seen him before? Whereupon the Court Reporter indicated that the witness, K.L., turned slightly in her chair and looked at the defendant/Respondent, Mr. Lavigne. TT. Vol. 1, page 253. The Prosecutor asked the child did you tell anyone who did this to you? The Prosecutor asked if the child told her mom who did it and the child nodded her head in the affirmative. The child then answered that she told her (mommy and daddy).³

When the Respondent's attorney, Barbara Allen, attempted to cross-examine the child, the child acted significantly less cooperative. Defense Counsel, Barbara Allen, asked if the child would talk about her father and asked what is her father like and the child answered "I'm not telling." Defense Counsel then asked what's your mom like and the child said "I'm not telling." What's your baby brother like and the child said "I'm not telling." How about your big brother and the child said "I am not telling."

On redirect examination the Prosecuting Attorney asked the child do you remember who the person that hurt you looked like. I think you told Dr. Phillips who it looked like didn't you? The child then responded by looking over her right shoulder and pointing to the defendant/Respondent, her father. TT. Vol. 1, page 263. The Prosecutor then asked like your father and the child did not respond.

³Both parents testified that the child identified the father/Respondent as the rapist, and the Respondent also indicated the same to the 911 operator.

During the course of the trial there was no forensic evidence connecting the defendant to the crime such as DNA evidence. During Dr. Kim Martin's testimony she testified that generally they can get vaginal washings and try to get rectal washings for acid phosphates for semen, but the child was torn so severely and was gapping so badly that the saline that they would use for that purpose would just run off of her. Dr. Martin also stated that due to the fact that the child had received a bath by her mother and that she had been put in water beforehand, and usually once they have had a bath, that will tend to interfere with sample collection and she was bleeding. Even by the time she came to the emergency room, the blood was starting -- there would be big clots, but she was still bleeding, and that would tend -- there is a flushing type mechanism of bleeding, so I'd say it would influence the sample collection. As far as getting vaginal washings, it was impossible she was torn open so wide. TT. Vol. 2, page 682.

In conclusion, after reading the trial transcript one would find that the child was brutally raped in the church parking lot in February, 1996. That after the child was raped she ran back to her home, and instead of running directly to her parents for help and comfort as would be expected, chose to seek refuge with her brother. The defendant/Respondent then claims that he discovered the child in the bathroom and then felt compelled to disclose that the child was identifying him as the rapist. The defendant/Respondent then claimed to have woken up the mother, again who heard the child's accusations that the husband/father was the rapist and which the mother testified that she had difficulty believing due to the fact that she was a light sleeper.

The jury learned that instead of both parents immediately calling 911, that they chose to give the child a bath which significantly impacted the State's ability to collect evidence and that the defendant/Respondent's father made an allegation that he attempted

to go back out to the parking lot to look for evidence, and that only after returning home did he conclude with his wife that they then needed to call 911.

The paramedics, law enforcement officers, and treating physicians all testified that the child's initial reactions were to blame the Respondent father for the brutal rape and when the mother, Jamie Loughner, was present, the mother would verbally challenge the child and engage in argument to persuade the child to change her story. This was done by the same woman who immediately chose not to dial 911 and the same woman who placed the child in a bathtub arguably with the intent to destroy evidence.

The jury heard the Respondent in his preoccupation of the fact that the child was identifying him as the rapist on at least five (5) occasions during the 911 conversation. Law enforcement officers testified that during questioning that the defendant/Respondent at one point stated that if he had indeed committed the rape that he would not remember it, and then a dialogue of cross-examination evolved that concept into if I did do it I was in a fugue state.

VI. SUMMARY OF ARGUMENT

1. The Circuit Court committed reversible error when it held that a jury instruction deprived the Respondent of his constitutional rights to a fair trial. The trial Court in this case provided the jury instruction as follows: "The Court instructs the jury that a conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible. Thus, if you believe the testimony of K.L.L. beyond a reasonable doubt, you may return a verdict of guilty under the indictment." TT Vol. 3, page 1032. The Circuit Court of Putnam County found the jury instruction to be

inappropriate in that the Circuit Court concluded that the child's testimony did not provide an in-Court identification of the Respondent and thus did not provide any benefit to the State. The Court then went on to conclude that the introduction of the jury instruction misled the jury and provided the presumption that the child's testimony was indeed beneficial to the State.

The Petitioner argues that the Circuit Court abused its discretion and is clearly erroneous in its conclusion that the State did not provide evidence that identified the Respondent as the perpetrator. The Circuit Court abused its discretion by not considering the child's testimony in conjunction with other admissible evidence that was provided in the trial. Particularly the Petitioner argues that the Circuit Court abused its discretion when it refused to take into account certain portions of the trial record that clearly indicated that the child made an identification of the Respondent as the perpetrator in the Courtroom.

The Petitioner argues that the legal instruction provided to the jury was not inappropriate and in no way misled the jury concerning the appropriate law to be applied in this case.

2. The Circuit Court made a reversible error by finding that the trial Court's limitation of four (4) character witnesses is justification for providing the Respondent with a new trial. The trial Court in this case allowed the Respondent to call four (4) character witnesses to testify on his behalf. The Circuit Court has held that the trial Court's limitation of four (4) character witnesses was an abuse of the trial Court's discretion and violated the Respondent's constitutional right to provide evidence in his defense. The Petitioner contends that even though the Circuit Court may not have agreed with the trial Court's decision to limit the character witnesses to four (4), the Circuit Court has no legal basis to grant a new trial, in that the evidence in the case does not justify a finding that the trial Court

abused its discretion. The Petitioner argues that Rule 403 of the Rules of Evidence provides the trial Court discretion in limiting relevant evidence. The Petitioner argues that by allowing four (4) character witnesses to testify on behalf of the Respondent that the trial Court did not abuse its discretion and the trial Court's limitation of four (4) character witnesses should not be grounds for a new trial.

3. The Circuit Court abused its discretion by making a finding that there was not sufficient evidence to support a conviction of the Respondent in this case. West Virginia law is clear in the case of State v. Guthrie, 194 W.Va. 657, 641 S.E.2d 163 (W.Va. 1995) that the Respondent's challenging of the sufficiency of evidence to support a conviction under the law will take on a very heavy burden, and an appellate court must review all evidence whether direct or circumstantial in a light most favorable to the prosecution, and must credit all inferences and credibility assessments which may have gone in favor of the State. West Virginia law states that only in extraordinary circumstances, on a Petition For Writ Of Habeas Corpus, an appellate Court is entitled to review the sufficiency of the evidence. The Petitioner contends that the Circuit Court abused its discretion by reviewing the issue of sufficiency of evidence in that there was no extraordinary circumstances in this case to warrant such a review. The Petitioner argues that the Circuit Court has inappropriately second guessed a jury verdict by supplementing its own personal evaluation of the case when the record is clear that there was sufficient evidence to support a conviction.

VII. ARGUMENT

- I. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT HELD THAT A JURY INSTRUCTION DEPRIVED THE RESPONDENT OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The Petitioner challenges the Circuit Court's finding that the jury instruction supplemented by presumption the identity of the Respondent as the victim's assailant and denied him his constitutional right to a fair trial.

During the trial of the respondent a jury instruction was read in which the following was stated:

The Court instructs the jury that a conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible. Thus, if you believe the testimony of K.L.L. beyond a reasonable doubt, you may return a verdict of guilty under the indictment. Trial tr. Vol. 3, 1032.

In the Circuit Court's ruling the Court stated correctly that when challenging a jury instruction in a habeas petition, the reviewing Court must examine all of the instructions as a whole to determine whether a jury would have been misled. The Circuit Court did not challenge the legal principles that supported the jury instruction. The Circuit Court's ruling is based upon its conclusion that the facts and evidence found in the record demanded that the jury instruction should not have ever been given. The Circuit Court made an allegation in its opinion that the victim's trial testimony did not identify the assailant, therefore the jury instruction was not proper.

The jury instruction in questions derives from the case of State of W.Va. V. Harry E. Beck, 167 W.Va. 830, 286 S.E.2d 234 (W.Va. 1981). In that case this Honorable Court

stated that a conviction for any sexual offense may be had on uncorroborated testimony of a victim, unless such testimony is inherently incredible, and stated that credibility is ordinarily a question for the jury. In that case this Honorable Court also stated that the uncorroborated testimony of the victim was sufficient to sustain a conviction for a first degree sexual assault even though the victim was immature and the charges arose in the context of a family dispute. See also State of W.Va. V. Greene, 260 S.E.2d 257 (W.Va. 1979) and State of W.Va. V. Beack, 126 W.Va. 895, 30 S.E.2d 541 (W.Va. 1944). In the State v. Beack (supra) case this Honorable Court refused to accept the proposition that the testimony of a victim of a sexual assault would not be sufficient to base a conviction unless it is corroborated by additional evidence.⁴

As the Circuit Court stated in its opinion, when challenging a jury instruction in a habeas petition, the reviewing Court must examine all of the instructions as a whole to determine whether or not the jury would have been misled. State ex rel Hall v. Liller, 207 W.Va. 696, 702, 536 S.E.2d 120, 126 (W.Va. 2000) When reviewing the jury instructions in the trial of the Respondent below, there is no evidence to suggest that the jury instruction in question would in any way mislead the jury in an improper way. There was additional language in the jury instructions that supplemented the language that was the focus of the Circuit Court's decision to reverse the conviction. The jury was also instructed:

"The Court instructs the jury if they believe the testimony of the victim in this case was uncorroborated, they should scrutinize such testimony with care and caution. However, the jury is further instructed that the testimony of the victim need only be corroborated in material facts which tend to connect the accused with the crime, sufficient to warrant the jury in crediting the truth of the victim's testimony and need not amount to independent evidence which supports the alleged ultimate fact that the accused committed the offense

⁴The alternative view would be a sexual assault conviction could not rest solely on the testimony of a victim without some additional corroborating evidence.

charged.”

Trial tr. Vol. 3, page 1032, 1033.

Therefore, when looking at the jury instructions as a whole it is clear that the Court wanted to inform the jury that they could base a conviction on the testimony of the victim alone, but if they found it to be uncorroborated, they should treat such testimony with care and caution. Throughout the jury instructions the jury was instructed that before the Respondent could be convicted of a crime that the State would have to overcome the presumption of innocence and prove to the satisfaction of the jury beyond a reasonable doubt all of the elements of the crime. See trial tr. Vol. 3, page 1033.

The Circuit Court in its opinion states that a constitutional error has occurred if a jury instruction supplies by presumption any material element of the crime charged. State v. O’Connell, 163 W.Va. 366, 256 S.E.2d 429 (W.Va. 1979) In the State v. O’Connell case supra this Honorable Court stated that a jury instruction should not implicitly establish a fact necessary for conviction. The Court stated that this is a constitutional impermissible shifting of the burden of proof. The Circuit Court’s problem with the jury instruction apparently is the fact that the Circuit Court has concluded that the child’s testimony did not identify the Respondent as the rapist and therefore, the instruction implies a presumption that the child did indeed identify the Respondent.

The Circuit Court abused its discretion and applied a factual argument to support its theory that is not supported by the record. In fact the record is clear that based upon the child’s testimony a jury could very well conclude that the child in many ways identified her father as the perpetrator of this crime. It must be remembered and has been ignored by the Circuit Court, that there were several witnesses who testified as to what the child had said on the day of the event. The most notable is the 911 tape when the Respondent himself

was recorded saying on at least five (5) instances that his daughter identified him as being the rapist. TT. Vol. 1, pages 185, 196, 187, 189, and 190.

Dr. Joan Phillips testified that when she spoke with the victim she was told that a man, "that looked like my daddy" carried her outside to the church parking lot. TT. Vol. 1, page 205. The child told Dr. Phillips that he had on green pants and a t-shirt that looked like my daddy's. TT. Vol. 1, page 206. Paramedic Frank Stover testified and said that she child told him...daddy carried me out the back door, I ran back in the back door after daddy hurt me. TT. Vol. 1, page 429. Paramedic Frank Humphreys testified that the victim said to him that my daddy took me over and she would refer to him as her daddy regarding the person who had raped her, and she would make reference to her daddy until the mother would come into "the picture" and then she would start saying that it looked like her daddy. TT. Vol. 1, page 505. Dr. Kim Martin testified that she interviewed the victim in this case. Dr. Martin testified about an argument that took place between the victim and her mother where the victim in the case turned to her mother and was very adamant. She said it was daddy. He was wearing green pants. She testified that the child repeatedly told her mother that it was daddy at which point the mother became very frustrated. TT. Vol. 1, page 686.

The Petitioner understands that an argument can be made that the above-referenced testimony is not an in-Court identification by the victim as focused upon by the Circuit Court opinion, but the Petitioner argues that the above-referenced testimony *in conjunction with* the child's in-Court testimony provides a clear identification of the Respondent as the perpetrator of the crime. The child was called upon to testify and at the time of her testimony disclosed that she was six (6) years old. TT. Vol. 2, page 245. She acknowledged that she remembered getting hurt and she acknowledged discussing her injuries with Dr. Joan Phillips at the hospital. TT. Vol. 1, page 247. She was asked if she

remembered to talking with Dr. Phillips, she acknowledged that she did. She acknowledged that she talked to Officer Ron Smith and then she acknowledged that she told them the truth. TT. Vol. 1, page 248. She acknowledged that she was at the hospital because she was raped. TT. Vol. 1, page 248.

During the child's testimony she was asked if she told her mom and dad who did it, i.e. (raped her), do you remember it, and she acknowledged that she did. The child stated that she told her (mom and daddy). TT. Vol. 1, page 254. Therefore, the child acknowledged in her testimony that she told her father who did it. The 911 tape which was played has the Respondent father saying on five (5) separate occasions that the child identified him as the perpetrator of the crime. The mother who testified also in her testimony testified on several occasions that the child identified the Respondent as the individual who committed the crime. The child's mother (the wife of the Respondent) testified that when she put the child in the bathtub and saw blood she ask the child what happened to her and the child responded, "daddy took me into the church parking lot and hurt me." TT. Vol. 1, page 285. Therefore, it is obvious that when the child took the stand to testify the child did not have the will nor the desire to do a verbal in-Court identification of the Respondent as the individual who raped her, but was able to muster the strength to acknowledge the fact that she had told other people **the truth about** who had raped her and in particular the treating physicians and the her mother and father.

Also during the child's testimony the Prosecutor asked the child regarding the identification of the rapist, have you ever seen him before and the child responded by the Court Reporter's description as follows, "whereupon the witness turned slightly in the chair and looked at the defendant." TT. Vol. 1, page 253. On redirect examination the child was asked by the Prosecutor do you remember who that person that hurt you looked like. I think

you told Dr. Phillips who it looked like didn't you? The child responded to the Court Reporter's notations as follows, "Whereupon the witness looked over her right shoulder and pointed to the defendant." TT. Vol. 1, page 263.

The Circuit Court made a decision to refuse to consider the testimony of other witnesses when evaluating the testimony of the six (6) year old child victim. To suggest that a jury would not consider the other testimony that they have heard in the trial when considering and interpreting the child's testimony defies any logic. The Circuit Court made a legal analysis that the State v. Beack jury instruction could only be given if the child's testimony would have addressed each and every element of the crimes charged in the case. Vol. 1, appendix, page 42. This legal interpretation states that this jury instruction can not be given in any case unless the victim of the alleged sexual assault covers each and every element of the crime from venue to the legal requirement to establish the age of a perpetrator, versus the age of a victim, and family relationships that would be needed to be established in crimes such as incest. There is absolutely no legal authority to suggest or can be found that would require a victim of a sexual assault case to provide evidence of each and every element of a crime as a prerequisite to giving this jury instruction. This is particularly more complicated when the victim of a crime is five (5) years old and called to testify at the age of six (6) years.

The Circuit Court's ruling would imply that a blind victim of a sexual assault could not have the benefit of a "State v. Beack" jury instruction because they may not be able to do an in-Court identification of a defendant.

In order to support the decision the Circuit Court made a decision to ignore certain observations made by the Court Reporter in the trial transcript. The Petitioner in this case believes that this a gross abuse of the Circuit Court's discretion, when it is being used as a

basis to second guess a jury's verdict of a criminal trial that dealt with the brutal rape of a five (5) year old child. What is interesting about the Circuit Court's opinion is that it cites authority which the Petitioner believes actually supports the proposition that the Court Reporter's observations were appropriate to include in the record. The Circuit Court cites such authority as the Texas Court Reporter's Certification Board Uniform Format that discusses common parentheticals such as moving a head up and down and moving a head from side to side. The Indiana Court Reporter's Handbook cites examples of alternative parentheticals such as the witness's gesture towards the door or the witness's "nod". The Indiana Judicial Center Court Reporter's Handbook discusses parentheticals such as physical indication by a witness. Vol. 1, appendix, pages 43-46. The Circuit Court concluded that it is clear that a Court Reporter can translate basic affirmative or negative nonverbal gestures such as a point or a head nod. But our Circuit Court then goes on to say that a parenthetical however is not for interpreting complex, subtle or nonverbal motions that are not affirmative or negative.

The facts of this case clearly show from the transcript that the parenthetical in question is as basic as nodding a head or shaking a head from side to side or many of the others that have been cited by the Court as being completely appropriate. The Circuit Court has decided to focus upon the fact that a Court Reporter made a notation that when a six (6) year old victim of a rape was asked if she had ever seen the person who raped her before, and responded in a nonverbal way by turning slightly in the chair and looked at the defendant/Respondent as "complex" and "subtle" gesture. The child on another occasion was asked do you remember what the person who hurt you look like, and the Court Report chose to put into the transcript that the six (6) year old witness not making a sound looked over her right shoulder and pointed at the defendant/Respondent. TT. Vol. 1, pages 253

and 263.

For the Circuit Court to suggest that these actions are complex and subtle, nonverbal motions defies logic. Arguably if a witness can nod their head yes or no or even point as suggested by the Court in its opinion, then why would a Circuit Court choose to ignore the physical actions of this six (6) year old witness in a rape case.

What is even more disturbing for the Petitioner, is the Circuit Court's argument that it believes that the events recorded by the Court Reporter never actually took place. See page 35 of the Circuit Court's opinion. Vol. 1, appendix, page 47. The Circuit Court ignores the Prosecutor's statement in the closing argument in TT. Vol. 3, page 1040, when he said:

"Ladies and gentlemen, testimony is just not words. You can watch a witness and determine from their actions what they are telling you.....You don't have to because not only her words, but the evidence supports what she has told you..." (emphasis added)

TT. Vol. 3, pages 1040 and 1041.

The defendant/Respondent was represented in the criminal case by Barbara Allen, a very competent respected member of the West Virginia State Bar. If a Court Reporter would include such language in a transcript when it in fact did not take place, its very unlikely that the defendant's/Respondent's trial attorney would let that go without some form of serious challenge. Also, the Circuit Court's reasoning that the events did not take place is nothing short of accusing the Court Reporter of falsifying a transcript when there is absolutely no evidence to suggest the same. The Court Reporter provided a verification that the transcript is a true and accurate copy of the trial. TT. Vol. 3, page 1129.

The problem with the Circuit Court's opinion on the jury question issue is that it has taken the issue of determining credibility from the jury and has usurped the jury's

authority by concluding that the child's testimony was of no benefit to the State.

In the case of State v. Beack (supra) this Honorable Court stated

we therefore conclude that the conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim unless such testimony is inherently incredible, ***the credibility is a question for the jury***. (emphasis added)

II. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY FINDING THE TRIAL COURT'S LIMITATION OF ONLY FOUR CHARACTER WITNESSES AS A JUSTIFICATION FOR PROVIDING THE RESPONDENT WITH A NEW TRIAL.

During the criminal trial of the Respondent the trial Court allowed the Respondent the ability to call four (4) character witnesses. All four (4) witnesses testified about personally knowing the Respondent and being aware of his reputation in the community as basically an honest, law abiding citizen. There is nothing in the record to suggest that the additional character witnesses to be called by the Respondent would have added or could have added any additional or different information. TT. Vol. 3, pages 934-960.

The Circuit Court in its opinion acknowledged the fact that some court's have put limits on the number of character witnesses a person can call. The Circuit Court cited the case of United States v. Gray, 507 F.2d 1013, 1015-1016 (5th Circuit 1975), cert. denied, 423 U.S. 824, 96 S.Ct. 38 (1975) (allowing only three (3) character witnesses); United States v. Henry, 560 F.2d 963, 965 (9th Circuit 1977) (allowing only two (2) character witnesses). Obviously the Circuit Court does not agree with that case law and came to a conclusion and made the statement in its opinion that, "such a strict limit, however is not appropriate." The Circuit Court went on to state under West Virginia law a trial judge can not apply the Rules of Evidence in such a mechanistic manner so as to exclude evidence

which is critical to the defense without violating the due process clause of our United States Constitution... Vol. 1, appendix, page 53. The Petitioner argues that the Circuit Court is requiring a trial judge to apply the Rules of Evidence in a mechanistic manner. This Circuit Court is basically arguing that we should establish rule that four (4) character witnesses in a criminal trial is not sufficient and denies a defendant his or her constitutional rights.

The Circuit Court went on to state that in the Respondent's case that the Respondent's character as a loving father with a propensity for non-violence were important facts for a jury to consider. Vol. 1, appendix, page 54. Arguably this begs the question as to whether or not a sex offender's reputation in the community really has any factual bearing on the question of whether or not he or she is a sex offender who is interested in molesting children. History has shown that respected clergy, professionals and notable figures in a community who are well respected and have the ability to call many character witnesses, are often times convicted of sex crimes relating to children.

In West Virginia rulings on the admissibility of evidence are largely within the sound discretion of a Court. State v. Riley, 201 W.Va. 708, 714, 500 S.E.2d, 524, 530 (W.Va. 1997) The trial Courts rulings will only be reversed when there is an abuse of discretion. Rule 403 of the Rules of Evidence of our State allow a trial judge to exclude evidence if the Court believes that it can account for needless presentation of accumulative evidence. See State v. Bass, 189 W.Va. 416, 432 S.E.2d 86 (W.Va. 1993).

United States Supreme Court case Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213 (1948) dealt with the issue of character evidence in a criminal trial. In that case the United States Supreme Court discussed the importance character evidence may have to the accused, but also discussed the perils of such evidence in a criminal trial. The Court stated that character evidence at its worst, opens a pandora's box of irresponsible gossip,

innuendos and smear. The Court stated that in the frontier phase of our laws' development, calling friends to vouch for the defendant's good character, and its counter-part calling the rival enemies to impeach him by testifying about his reputation for veracity, was so bad that it was unworthy of belief, and it was often ways to converting individual litigation to a community contest, and a trial into a spectacle. The Court went on to explain that the courts of last resort in this country have sought to overcome the danger that the true issues will be obscured and confused **by investing the trial Court with discretion to limit the number of such witnesses and to control the cross-examination.** (emphasis added)

This legal reasoning can be the explanation for the existence of our Rule 403 of the Rules of Evidence which allows a trial Court to exclude relevant evidence on the grounds of prejudice, confusion or waste of time. See Lonnie R. V. George Trent, 194 W.Va. 364, 460 S.E.2d 499 (W.Va. 1995)

Would the Circuit Court have been satisfied with five (5) witnesses instead of four (4) or would the Circuit Court have made a ruling that the trial Court abused its discretion unless the trial Court would have allowed at least six (6) to eight (8) character witnesses to testify in the criminal trial? This is illustrative of the problems created when appellate courts engage in second guessing trial Courts on these discretionary issues. Common sense dictates that a trial judge allowing four (4) character witnesses to testify on behalf of a defendant is far more defensible than if a trial judge would only allow one (1) or maybe two (2) to testify. But if this Circuit Court ruling declaring that four (4) character witnesses is an abuse of discretion would be allowed to stand, it will create appellate litigation in which trial judges are being second guessed on the limitation of character witnesses, and also put pressure on trial judges in the future to start second guessing what is the extent of their discretion under Rule 403. In the future will a trial judge feel compelled to allow eight (8)

character witnesses or out of an abundance of caution will they feel compelled to give the defendant the flexibility of calling as many character witnesses as they wish.

Even if the Circuit Court in this case has a fundamental disagreement with the trial Court's decision to limit the defense to four (4) character witnesses, it is still inappropriate for the Circuit Court to make a finding that the trial Court abused its discretion in this regard, and make a finding that the Respondent should be entitled to a new trial based upon this reason.

III. THE CIRCUIT COURT ABUSED ITS DISCRETION BY MAKING A FINDING THAT THERE WAS NOT SUFFICIENT EVIDENCE TO SUPPORT A CONVICTION OF THE RESPONDENT IN THIS CASE.

The Circuit Court of Putnam County stated on page 42 of its opinion, "The West Virginia Supreme Court of Appeals has stated that a potential ground for relief in a habeas corpus action is the challenge to the sufficiency of the evidence." Vol. 1, appendix, page 55. Losh v. McKenzie, 166 W.Va. 762, 768, 769, 277 S.E.2d 606, 611 (W.Va. 1981). The Court went on to say that one should review the case of Cannellas v. McKenzie, 160 W.Va. 431, 437, 236 S.E.2d 327, 331 (W.Va. 1977) which states, "except in extraordinary circumstances, on a petition for habeas corpus, an appellate Court is not entitled to review the sufficiency of the evidence."

The Circuit Court in this case has abused its discretion by second guessing a jury verdict in this case. The record is clear in this case that despite the fact the Circuit Court may disagree with the jury's conclusion, there is no extraordinary circumstances that would justify the Circuit Court in making a finding there was not sufficient evidence to support a conviction in this case. The Circuit Court in its ruling made subjective arguments based

upon its own personal beliefs and review of the evidence as to why the State failed to prove its case beyond a reasonable doubt, by choosing to ignore the expected complexities of the criminal case dealing with a five (5) year old victim who was allegedly brutally raped by her father, and was subsequently denied the emotional support of her mother.

In the case of State of W.Va. V. Guthrie, 194 W.Va. 657, 641 S.E.2d 163 (W.Va. 1995), this Honorable Court said that a defendant challenging the sufficiency of evidence to support a conviction under the law will take on a very heavy burden, and an appellate court must review all evidence, whether direct or *circumstantial*, in a light most favorable to the prosecution, and must credit all inferences **and credibility assessments** which may have gone in favor of the State. (emphasis added) The Court stated that an appellate review is not a device for a public court to replace any findings with its own conclusions, as an appellate court may not decide credibility of a witness. Credibility determinations are for the jury and not for appellate courts. In the Guthrie case this Honorable Court said that a verdict should be set aside only when the record contains no evidence regardless of how it is weighed, from which a jury could find guilt beyond a reasonable doubt.

In the Guthrie case, supra, this Honorable Court stated "as we have cautioned before, appellate review is not a device for this Court to replace a jury's finding with their own conclusions. On review we will not weigh evidence or determine credibility. Credibility determinations are for the jury and not an appellate court... Finally, a jury verdict should be set aside **only when the record contains no evidence**, regardless of how it is weighed, from which a jury could find guilt beyond a reasonable doubt." (emphasis added) This Honorable Court went on to discuss that when an appellate court reviews a case relating to whether or not there is sufficient evidence to support a conviction, the Court stated, "We

began by emphasizing that our review is conducted from a cold appellant transcript and record. For that reason, we must assume that the jury credited all witnesses whose testimony supports the verdict.” See State v. Longerbeam, 226 W.Va. 555, 703 S.E.2d 307, 308 (W.Va. 2010), State v. Gilman, 226 W.Va. 453, 702 S.E.2d 276 (W.Va. 2010), State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (W.Va. 1999), State v. Broughton, 196 W.Va. 281, 473 S.E.2d 413 (W.Va. 1996).

The Circuit Court abused its discretion and is clearly erroneous in its findings that in the criminal case against the Respondent that the State failed to provide any evidence in which a jury could find guilt beyond a reasonable doubt. The Court’s factual conclusion that the record shows nothing more than inconsistent statements from a six (6) year old victim without any supporting evidence or any identification of the Respondent as the perpetrator clearly defies a review of the record.

The evidence that exists that supports a conviction is mainly circumstantial in nature. In the case of State v. Guthrie, supra, in syllabus point 6, this Honorable Court stated that there is no qualitative difference between direct and circumstantial evidence. Therefore, it would be inappropriate for the Circuit Court to discount circumstantial evidence and form a conclusion that an in-Court verbal identification of the defendant by the victim is required to support a conviction.

The evidence provided in the record that supports a conviction can be outlined as follows:

- 1. The evidence in the case indicates that the victim had clearly identified the defendant as the perpetrator.** When the child testified in the courtroom she was asked by the Prosecutor if she recalled the date and circumstances of her rape and she

acknowledged that she did. TT. Vol. 1, page 247. She was asked if she remembered telling Dr. Joan Phillips information regarding the rape and she acknowledged that she did. TT. Vol. 1, page 248. She testified that she had told her mother and father who the rapist was. TT. Vol. 1, page 254. She acknowledged that she told Officer Smith the truth. TT. Vol. 1, page 248. Then during the trial the mother, father (who is the Respondent), Dr. Phillips, Officer Smith, and most importantly the 911 tape, clearly provided the evidence that the child said the defendant/Respondent was the individual responsible for the rape. The child's testimony in the courtroom in conjunction with the child's statements to her mother, father, emergency and medical personnel, and others, clearly indicates that the child identified the Respondent as the perpetrator of the crime. Most importantly during the trial the Prosecutor asked the child to identify the individuals who assaulted her and the Court Reporter indicated that the child turned slightly in the chair and looked at the defendant/Respondent, Mr. Lavigne. On redirect examination during the trial the Prosecutor asked the child what the person looked like that hurt her and the child responded by looking over her right shoulder and pointing to the defendant/Respondent, her father. Therefore, a reasonable jury can conclude that based upon the common experiences of adult life that the child had clearly identified the defendant/Respondent as the perpetrator.

2. The child's reaction and demeanor during direct and cross-examination, and behavior with law enforcement professionals and others relating to the crime, is consistent with a theory that after the rape, the child was subject to pressure and intimidation by her mother to change her story, and to second guess her initial accusation that the Respondent was the rapist. The evidence is clear in this case that

the Respondent's wife and victim's mother, Jamie Loughner, engaged in a pattern of behavior that not only suggested that she potentially destroyed evidence in this case, but she used her position as the child's mother to intimidate and persuade the victim in this case to not identify the Respondent as the perpetrator of the crime. From the very beginning the Respondent's wife hesitated to call law enforcement authorities immediately upon discovery of the rape, made a decision to place the child in a bathtub and bathe the child which according to the testimony of Dr. Kim Martin lead potentially to the destruction of important forensic evidence. The record as cited previously in this brief is that on almost every instance that the child was interviewed by a professional such as paramedics, law enforcement or medical personnel in which the child identified the Respondent as the perpetrator, that the mother would engage in an argument with the child to try to convince her that that was not the case. Based upon this reality it was reasonable and natural for the jury to conclude and understand why the child would be reluctant to do an in-court identification of the Respondent.

The jury could conclude from the evidence in this case that not only was the child the subject of a brutal, vicious rape, but was also victimized by the circumstance of not receiving parental support and being pressured by her mother to not disclose the identity of the rapist, creating a horrible conflict in which K.L. was being asked by law enforcement authorities and others to disclose the rapist while at the same time being pressured by the mother to remain silent. The jury can conclude that a refusal to cooperate regarding the identity issue is how a six (6) year old victim would naturally react when being subjected to such circumstances, and creating an environment in which actions can speak louder than words. The entire picture of the case indicates quite frankly that the child's behavior itself is indicative that the father was indeed the rapist. If the rapist was an unknown intruder, her

behavior would be arguably different.

3. The Respondent, Mr. Lavigne, on numerous occasions admitted to authorities on the 911 tape that his daughter identified him as the rapist. The Respondent, Mr. Lavigne, indicated in his testimony that when he discovered that his child had been sexually assaulted, instead of immediately calling 911 that he chose to wake his wife and to go outside of the house in search of evidence. The Respondent, Mr. Lavigne, in his testimony and statements revealed the fact that after coming back in the house from searching for evidence and consulting with his wife that they chose to call 911. The jury can find that this is circumstantial evidence suggesting guilt due to a reluctance to immediately call for law enforcement and medical assistance and is also consistent with the idea that the Respondent's wife and mother of the victim of the victim was concerned and had reluctance that the notification of law enforcement and emergency medical personnel may result in a criminal prosecution of her husband. The Respondent at one point stated if he raped his daughter he would not remember it, or was in a fugue state.

4. The most powerful evidence supporting the principle that the child had identified the Respondent as her rapist was the fact that after the child was raped in the church parking lot that when the child returned to the house she did not immediately seek help from her mother and father. The evidence in the case clearly showed that the child chose to come back to the house and not go to her mother and father's bedroom, but chose to seek refuge and lay down next to her brother. Common sense dictates that if a five (5) year old child is abducted from her home by a stranger, brutally raped in a church parking lot, and goes back to her home, that the first place that the child would flee is to her mother's bedside crying for help. But in this case the child

chose not to go to the mother and father's bedroom, because the jury could conclude that the child would not want to return to the bedside of her rapist.

In State v. Guthrie this Honorable Court stated that it makes no difference whether members of an appellate court as jurors would have chose not to convict based upon the evidence in that an appellate review should only be based upon whether any rational jury could on the evidence presented reached a verdict.

VIII. Conclusion

The Circuit Court's conclusion that the jury instruction provided by the trial Court violated the constitutional rights has no merit. The Circuit Court's argument in this regard is based upon the Circuit Court's conclusion that the child had not identified the respondent as the perpetrator of the crime. The Petitioner contends that such conclusion is incorrect because the jury in this case could conclude very strongly from the totality of the evidence that the child identified the Respondent on numerous occasions as the perpetrator of the crime both through presentation of circumstantial and direct evidence.

Not only did the child identify the Respondent as the perpetrator of this crime, but the child did it in a very credible fashion in that the behavior of the child through the course of the events in the case is consistent with the way that a five (5) or six (6) year old would behave under same or similar circumstances as being a victim of a rape committed by her father and as being a victim of intimidation inflicted upon her by her mother. It is important to remember that the child at the very beginning clearly asserted that the Respondent was the perpetrator and as the child was subject to intimidation from her mother, the child then backed off of these allegations by saying it looked like her daddy and then evolved to the

point in the courtroom that she refused to verbally say that it was her daddy.

If a six (6) year was falsifying the allegation regarding her father, the behavior would arguably be different, and if the perpetrator of the crime was not the father the behavior would have been different.

The Circuit Court's action in making the determination that four (4) character witnesses is sufficient grounds to reverse a criminal case in a habeas proceeding creates a legal environment that would force trial judges in the future to allow the defendant's the ability to call numerous character witnesses, and thus undermine the concepts that support Rule 403 of the West Virginia Rules of Evidence.

The Circuit Court's contention that there is not sufficient evidence to support the conviction is without merit and completely over simplifies the complexity of the case in which a five (5) year old is the subject of a brutal sexual assault and is required to testify in a court of law when she is in fact the age of six (6). When determining whether or not there was any evidence that a jury could rely on to support a conviction, the Circuit Court should have taken into consideration the testimony of other witnesses which stated that the child had clearly identified the Respondent as the perpetrator, and taken into consideration the fact that the child was subject to intimidation and pressure from her mother to recant her story. The Circuit Court should have taken into consideration the fact that the child when she returned home made a decision not to seek out assistance from her mother and father, but chose to lay down next to her brother. The Circuit Court should have taken into consideration from the defendant/Respondent's actions of not immediately contacting 911, that there was hesitation on his part and the part of his wife to seek the involvement of law enforcement authorities when the rape was initially discovered.

Any suggestion by the Circuit Court in its opinion that the quality of the law

enforcement investigation in this case was poor is an inappropriate conclusion to be made by the Circuit Court under these circumstances.

Therefore, the Petitioner respectfully requests that this Honorable Court reverse the Circuit Court's ruling that the Respondent, Joseph H. Lavigne, Jr., is entitled to a new trial, and that the State of West Virginia can then proceed to have Mr. Lavigne committed to the West Virginia Department of Corrections to complete his remaining prison term.

Respectfully submitted,

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Correctional Complex, Petitioner

By: 

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CERTIFICATE OF SERVICE

I, Mark A. Sorsaia, Prosecuting Attorney of Putnam County, West Virginia, , do hereby certify that I have on this 30th day of August, 2011, served the within Brief Of The Petitioner upon the within named Respondent by hand delivering a true copy thereof to his Attorney, Greg Ayers, Public Defender, at his last known address at the Kanawha County Public Defender's Office, Charleston, West Virginia, and to the Respondent, Joseph H. Lavigne, Jr., pro se, to said address, as well as a complete copy of the designated record.



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