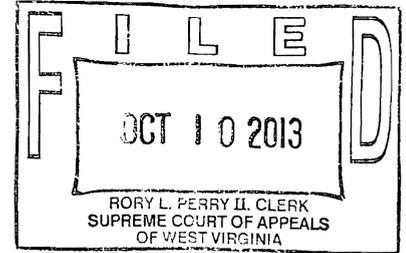


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 13-0890



IN RE: J.S., a Juvenile.

Appeal from the Circuit Court of Barbour County, West Virginia
The Honorable Alan D. Moats
(Circuit Court Case Numbers 13-JD-01, 13-JD-11)

PETITIONER'S REPLY

Submitted by:

Phillip S. Isner
Counsel for the Petitioner J.S.
WV Bar ID No. 9399
Curnutte Law Offices
PO Box 1605
Elkins, WV 26241
Phone 304-636-5904
Fax 304-636-5907
Email curnutte@justice.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 13-0890

Comes now the Juvenile Petitioner, J.S., by Counsel Phillip S. Isner, and hereby submits this *Reply* to the *Summary Response* filed by the State of West Virginia on September 30, 2013. The State's *Summary Response* begins with the incorrect statement that J.S. was placed in the care, custody and control of the Department of Health and Human Resources (hereinafter "DHHR"), and that is the Order from which this appeal is filed. J.S. is appealing the Order placing him in the custody of the Division of Juvenile Services (hereinafter "DJS") until he attains the age of twenty-one (21), and J.S. is also appealing the Order transferring him to the Rubenstein Center to start over in the program there without the benefit of receiving credit for his participation during approximately five (5) months at the Donald R. Kuhn Center. (A.R. 130-140) Previously in the case, the lower court entered an Order on February 27, 2013 that placed J.S. in the legal custody of the DHHR, but permitted him to go home in the physical custody of his parents. (A.R. 6-16) J.S. does request a ruling on this Order as improper because the lower court did not state on the record during the February 11, 2013 hearing that J.S. was placed in the legal custody of the DHHR. (A.R. 67-77) On the same day that the Order was entered, another "Order of Removal" was also entered placing J.S. at a DJS facility, but still in the legal custody of the DHHR. (A.R. 15-16) The "Order of Removal" makes no legal sense because a juvenile cannot be in the legal custody of the DHHR but placed in a secure detention facility through the Division of Juvenile Services (incorrectly referred to as the "Department of Juvenile services" in said Order). The DHHR Youth Services Worker assigned to J.S.'s case was

not involved in his placement on February 27, 2013, and a less restrictive DHHR facility was not considered for J.S., so him having been in the legal custody of the DHHR at any time is a legal anomaly.

J.S. was held in secure detention at all times since the removal from his parents on February 27, 2013, when the Sheriff's Deputy picked J.S. up at school and escorted him away in handcuffs in front of his peers and teachers without notice to his parents (and almost one week after the allegation that caused the pick-up Order to be issued). If J.S. was properly placed in the legal custody of the DHHR, he would have been transported to a Level 2 children's shelter by a DHHR Youth Services Worker, unless another more long-term or diagnostic placement had an opening. J.S. is appealing the lower court's Order that he was placed in the legal custody of the DHHR during the hearing on February 11, 2013 because the court did not state any such findings on the record, and by the time the Order was entered, J.S. was already picked-up by law enforcement and placed in secure detention, not a DHHR facility. J.S. has spent the bulk of his time in placement at the Donald R. Kuhn Center, a Level 4 DJS facility. He is now at the Rubenstein Center, which is considered a Level 3 DJS facility, but it is still the most restrictive type of placement as a secure detention facility. The Rubenstein Center may be called a "Level 3" in the DJS system, but it is very different and much more restrictive than any Level 3 DHHR residential facility. At the Rubenstein Center, J.S. is not permitted to recreate outside, he is locked in a cell at times, and he is not permitted to perform community service until he works his way up in the program, which will take several months, despite the fact that at the Donald R. Kuhn Center he earned and maintained the highest behavior level and was permitted to be out in the community on the work crew completing community service on a weekly basis. The

undersigned has attached a recent “Behavior Report” for J.S. from the Rubenstein Center, which shows that J.S. is doing well and complying with the program. The issue of “horseplay” being a negative behavior is disputed and should not be held against J.S. regarding the requested relief.

The State’s *Summary Response* fails to address many of J.S.’s Assignments of Error, and the State does not provide any legal or factual justification for why this appeal and expedited relief should not be granted in favor of J.S. being immediately released home to his parents.

In its Statement of the Case, the State misrepresents the nature of J.S.’s admission to burglary, as J.S. testified he did not know that the woman who lived there was at home. J.S. did not admit to knowing anyone was home, and law enforcement interviewed a neighbor who gave a statement that she told J.S. no one was home. (A.R. 32-37) Also, there is no evidence to support the State’s representation on Page 2 of the *Summary Response* that J.S. admitted to using a “tool” to attempt to shimmy the door to the house from the garage. His statement is clear that he used a piece of hard plastic, not a “tool,” and the State is trying to paint J.S.’s admission to burglary in a more negative light than is supported by the evidence. (A.R. 37) Further errors on Page 2 of the *Summary Response* must be addressed to clarify the State’s misrepresentation of the record. J.S.’s mother did not state that they moved to Barbour County from Upshur County because J.S. was kicked out of his previous school for exposing himself (which allegation is contested by J.S.). (A.R. 62-63) The mother was not testifying under oath, she was being questioned by the court as to past alleged acts and behaviors of J.S., and the mother had no understanding how the information could be misunderstood and used against her son for the purpose of placement in a secure detention facility. The State had not called the mother, nor anyone else to testify under oath and be subject to cross examination as to J.S.’s past behaviors

for the purpose of the court considering placement. J.S.'s mother stated that they had already bought their house in Barbour County (prior to the allegation of J.S. "exposing himself" and being kicked out of school in Upshur County), and she also clearly stated that many students' parents said he was falsely accused of "exposing himself." (A.R. 63) The mother did state that they wanted to move because of other problems at school and not wanting to live in Upshur County, but the relevance of the court's questioning in this regard is lost on the undersigned Counsel. (A.R. 61-64) During this hearing, the mother testified that they had moved to Barbour County one year prior and that J.S. was held back one year. At the hearing on June 7, 2013, the alleged battery victim testified that J.S. had been picking on him prior in the year and the court inquired further. (A.R. 95-97) The result of that inquiry makes it seem as if the alleged battery victim had been "picked on" by J.S. for *two years* when he had not even been at the same school for that long. When J.S. was questioned by the undersigned Counsel, the stress of the proceedings may have further confused the issue, because J.S. answered that he knew the alleged battery victim since his freshman year (which is true because he was held back a year, but his answer did not mean he had known the alleged battery victim for two years). (A.R. 99) The relevance of pointing out these inconsistencies in the State's *Summary Response* (and apparently in the record) is that the lower court used such inconsistent testimony to make a finding that J.S. had a chronic bullying problem, which is not supported by the facts and actual testimony on the record.

The State continues to point out statements made by J.S. and his parents about behaviors and concerns that should warrant rehabilitative in-home services and the supervision of probation before placement is considered. J.S.'s mother also stated to the court that J.S. has a learning

disability (J.S. has been evaluated for “special education” and has a 504 plan), which was overlooked by the lower court. (A.R. 64) However, the State and lower court highlighted that the alleged battery victim in case number 13-JD-11 is a “special education student,” only supported by his testimony in response to the court’s questions. (A.R. 96) If proper evidence supported the behaviors and issues highlighted by the State in its *Summary Response*, and if the court properly found that J.S. remaining in his home was contrary to his best interests, clearly J.S. needed rehabilitation and therapeutic placement before punishment and detention. West Virginia law mandates that juveniles with the type of problems attributed to J.S. be afforded the chance at less restrictive rehabilitative placement prior to secure detention. The State’s *Response* also seems to miss the point that J.S. is readily contesting that the court’s “zero tolerance policy” and threats of immediate detention during the hearing on February 11, 2013 were improper because J.S. was not first afforded services or a less restrictive placement, and being placed in detention without an immediate hearing is clearly in violation of West Virginia law.¹ J.S. did not fully understand the terms of his release home to his parents on February 11, 2013 because the courtroom environment was stressful, J.S.’s prior Court-appointed Counsel had not adequately represented his interests during the hearing and did not explain anything to him or his family after the hearing, and the Order detailing the terms of his release was not entered until J.S. had already been picked-up by law enforcement. The actual terms set forth by the court during the hearing on February 11, 2013 were all followed by J.S. and his parents, and an allegation of a “battery” at school where the alleged victim was not injured and almost a week passed before any action was taken should not have been grounds for immediate detention without a hearing.

¹ The undersigned is not asserting that a juvenile can never be picked-up and placed in secure detention. The undersigned asserts that an allegation of “battery” under the circumstances did not warrant immediate detention and that a detention hearing should have been conducted. There was no emergency, as detailed in the appeal brief.

The State's *Summary Response* continues to misrepresent facts on Page 3, such as the insignificant statement that J.S. was placed at the Donald R. Kuhn Center in Parkersburg, WV, which is actually located in Julian, WV. J.S. was initially placed at the Lorrie Yeager Juvenile Center in Parkersburg, WV until a bed became available at the Kuhn Center. More troubling is the State highlighting that J.S. was accused in Juvenile Petition 13-JD-11 of having poured diesel fuel on the alleged battery victim "a year prior to the incident in question." J.S. was not attending that school a year prior to the incident in question, and the police report for the battery charge reads that the alleged battery victim stated that "previously in the year (J.S.) poured diesel fuel on him causing him to have to be taken to Broaddus Hospital to be treated for chemical burns." (A.R. 23) J.S. disputes that he poured anything on the alleged victim previously in the year, and J.S. and his family had not received any reports of that juvenile having gone to the hospital because of J.S.'s actions. (A.R. 109) The Petition in case number 13-JD-11 was for an allegation of "battery" on February 21, 2013, and allegations of a separate prior act of battery should not have been considered by the lower court. Common sense dictates that if J.S. had in fact poured a caustic substance on the alleged battery victim previously in the school year which resulted in medical treatment, medical records would have been produced and disciplinary action would have been taken against J.S. by either the school or law enforcement, or both. Bare allegations of a prior bad act without supporting documentation and without an adjudication should not have been considered by the lower court for disposition and placement of J.S. The testimony of the alleged battery victim that is highlighted by the State beginning on Page 4 of the *Summary Response* contradicts the initial police report and fails to consider that it was group of kids locking each other in a classroom closet. (A.R. 101-103) There was no mention in the

initial police report of J.S. having used a shovel to hit the alleged battery victim, and his testimony contradicts the police report. (A.R. 92-94) The State discusses the allegation of a prior bad act by J.S. against the alleged battery victim on Page 4 as if it were a different incident from what was stated in the police report, and the State even goes so far as to misrepresent “that on previous *occasions* the petitioner had poured break cleaner on him, and poured “kitty litter” over his head, coat and pants pockets” as if there was more than one prior incident where J.S. was accused to have poured something on that juvenile.

Page 4 of the State’s *Summary Response* continues to misstate facts on the record and improperly asserts that the Kuhn Center Diagnostic Evaluation of J.S. should be reviewed and considered by this Court, without first addressing the relevant objections of J.S. within the *Petitioner’s Brief*. The undersigned Counsel has not received a copy of any motion to the lower court by the Barbour County Prosecutor to unseal the Diagnostic Evaluation, and would object to the same for the reasons set forth in the *Petitioner’s Brief*. For the purpose of this Court deciding on the requested relief, the evaluation is irrelevant because J.S. has already been in placement since February, 2013 and the evaluation recommended a Level 3 placement, which the court denied although a Level 3 DHHR placement (the Elkins Mountain School) had accepted J.S. The evaluation was not discussed on the record but for the recommendation of a Level 3 placement and hearsay statements that were not properly presented by testimony on the record. The State did not call any witnesses to testify to the contents of the evaluation, and some of the information contained in the evaluation is contested by J.S. and his family, or was taken out of context and misrepresented. Regardless, the lower court did not follow the recommendation of the Diagnostic Evaluation, and the fact that the Rubenstein Center initially rejected J.S., in part

because of information contained in the evaluation that J.S. disputes, is indicative of why unsupported hearsay statements contained in such a document should not be considered without a juvenile having the opportunity to challenge the evaluation's statements and findings.

The State continues in the middle of Page 4 with another clear misstatement of the record that “[t]he petitioner’s probation officer testified that the petitioner had ‘talked to the workers down at Donald R. Kuhn and that [petitioner] has a lot of issues. A. lot. He likes to pick on people.’” (A.R. 124) The probation officer assigned to J.S.’s case did not speak at that hearing, it was the DHHR worker Roger Brown, who was not testifying under oath and who made improper and vague hearsay statements based on his conversation with staff at the Kuhn Center and without Counsel for J.S. having any opportunity to cross-examine these people. Regardless, is “picking” on people sufficient basis for placement in secure detention until the age of twenty-one (21) when no other placements were first tried? Mr. Brown, as the DHHR Youth Services Worker, had not arranged for any in-home or therapeutic services for J.S. after the initial Petition was filed in January, 2013, and he should not have been permitted to relay unsupported hearsay statements about J.S. for the purpose of disposition. The State most likely inadvertently misquoted the record at A.R. 124, but it could read as if J.S. (the petitioner) was talking down to the workers at the Kuhn Center. Regardless, the behaviors attributed to J.S. throughout the proceedings and within the State’s *Summary Response* (although some disputed by J.S.) do not warrant detention until the age of twenty-one (21) when J.S. had never been placed in a less restrictive rehabilitative program. The lower court being aggrieved by the petitioner’s “ongoing bullying behavior while in detention” is exactly the issue for review on appeal because proper and sufficient evidence was not presented on the record below for the court to make such a

finding. There was one instance at the Kuhn Center attributed to J.S. and reported to the court by the probation officer who received an email from someone at the Kuhn Center. (A.R. 123-124) The email was not provided to Counsel for J.S. and no “formal complaint” by the Kuhn Center was ever produced. That is not just hearsay, it is triple hearsay and should not have been considered for the purpose of disposition. The lower court obviously considered this email report based on the court’s statements prior to announcing the disposition, despite the testimony of J.S. explaining the incident. The State’s *Summary Response* ignores the heart of J.S.’s appeal that much of the lower court’s findings and justifications for its disposition are not based on proper evidence presented on the record. Secondhand reports, unsupported and vague testimony of alleged prior bad acts, and speculations based on the court’s observations and opinions of J.S. and his family do not justify secure detention until the age of twenty-one (21) considering the totality of J.S.’s circumstances. At this point, J.S. starting over in the program at the Rubenstein Center after being in detention since February, 2013 is overly punitive for J.S.’s adjudications. J.S.’s behavioral history, as placed on the record and contained in the Diagnostic Evaluation, even if not disputed by J.S., warrants rehabilitation and treatment which is no longer available to J.S. because of his age. The State and the lower court missed the point of the Juvenile Justice System according to West Virginia law, which is foremost rehabilitation of juveniles. A disposition of detention until the age of twenty-one (21), with the proclamation that the lower court will consider releasing J.S. to a level three program if he earns it, is illegal and unenforceable. Maybe the lower court does not clearly understand the DJS system and how a “program” works in placement. Was J.S. given a “flat sentence”? If J.S. successfully completes

a program in secure detention, does that not automatically warrant his release home? The State fails to justify the lower court's disposition and does not properly address the grounds for appeal.

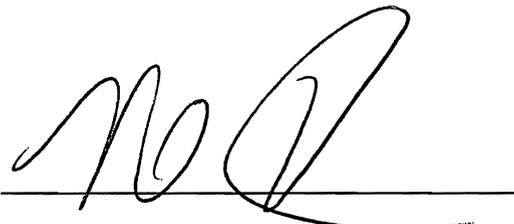
The State continues to misrepresent the case at bar in the Argument section of the *Summary Response*. J.S. is not in the legal custody of the DHHR, there is no such Order that a juvenile would be in the legal custody of the DHHR but placed at a DJS facility. The WV Division of Juvenile Services is a separate agency than the WV DHHR, and DHHR placements are distinctly less restrictive and ostensibly more therapeutic than any DJS facility. Placement at a Level 4 juvenile detention facility should be reserved for the most serious of adjudicated juveniles and juveniles with a history of prior placements. On Page 6 of the *Summary Response*, the State again improperly argued that the lower court arrived at its conclusion based on "extensive psychological and substance abuse diagnostics, petitioner's history of behavioral issues, *prior delinquency proceedings*, reports from school officials and probation officers..." (Emphasis added) Nowhere on the record below is any evidence ever presented that J.S. has prior delinquency proceedings. If the State is referring to the two petitions filed against J.S. in Barbour County for which he was placed in detention, the argument on appeal is that a less restrictive placement should have first been tried. It is exactly the issue on appeal that the lower court considered the other quoted information cited by the State, which J.S. argues was not properly presented on the record, to determine the disposition for J.S. J.S. asserts that if such information was given to the court for consideration of placement, Counsel for J.S. should have been afforded the opportunity to inspect, investigate and refute the same. The record is clear that proper evidence of J.S.'s past behaviors was not presented and that the lower court either acquired information not presented on the record or merely speculated as to J.S.'s history.

The West Virginia Code section cited by the State on page 7 of the *Summary Response*, 49-5-13(b)(4) refers to placement of a juvenile by the DHHR and is irrelevant to this appeal. J.S. was not placed in secure detention pursuant to this Code section. Again, the State construes the behaviors of J.S. in a more negative light than is supported by the record (by again stating that he admitted to trying to break into a home when the female resident was at home when J.S. did not know she was home) and by referring to “petitioner’s well documented pattern of committing acts that were violent...” on Page 8. The record is completely devoid of credible evidence that J.S. has a “pattern” of violence, and if the alleged battery victim ever went to the hospital because of J.S.’s actions, medical records should have been produced and prior disciplinary actions would have been taken. There are no reports that J.S. was “violent” at the Kuhn Center, he was accused by the court through an undisclosed email and alleged facility “complaint” of engaging in one instance of “bullying” behavior, and the DHHR worker offered unsupported hearsay as to the same. It is exactly these types of findings by the lower court that should be addressed on appeal because sufficient and credible evidence was not set forth on the record to justify the court’s findings and disposition.

Based on the totality of J.S.’s circumstances, the lower court clearly abused its discretion by placing J.S. in detention without a hearing, and by later issuing a disposition that is improper, and arguably illegal. The State’s *Summary Response* does not adequately refute the Assignments of Error on appeal, and the relief requested in the *Petitioner’s Brief* should be granted without further delay. J.S. is complying with the rules at the Rubenstein Center but he should not have to start over in that program before he is considered by the lower court for release home. It is in the best interest of J.S. to be immediately returned home with services.

WHEREFORE, the Petitioner respectfully moves this Honorable Court to grant expedited relief on appeal and Order J.S. to be released from the Rubenstein Center to the legal and physical custody of his parents. J.S. has benefitted overall from his placement since February, 2013 and he will comply with any terms of supervised probation. In the alternative, J.S. requests that secondary relief be granted, as detailed in the *Petitioner's Brief*.

Respectfully submitted,
PETITIONER,
J.S., A JUVENILE,
BY COUNSEL:

A handwritten signature in black ink, appearing to read 'P. Isner', is written over a horizontal line.

Phillip S. Isner, Attorney at Law
WV Bar ID No. 9399
Curnutte Law Offices
PO Box 1605
Elkins, WV 26241
Phone 304-636-5904
Fax 304-636-5907
Email curnutte@justice.com

CERTIFICATE OF SERVICE

The undersigned Counsel hereby certifies that on the 10th day of October, 2013, a true copy of the *Petitioner's Reply*, with attachment; and a true copy of the *Amended Table Of Contents For Appendix Record* were sent to the State of West Virginia, to its Counsel Julie A. Warren, Assistant Attorney General, 812 Quarrier Street, 6th Floor, Charleston, WV, 25301, via postage pre-paid USPS mail.



Phillip S. Isner
Counsel for the Petitioner J.S.
WV Bar ID No. 9399
Curnutte Law Offices
PO Box 1605
Elkins, WV 26241
Phone 304-636-5904
Fax 304-636-5907
Email curnutte@justice.com