

**BEFORE THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA**

**No. 33529**

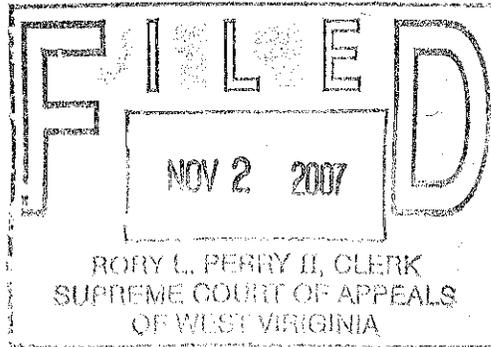
**JOSHUA C. WEARS,**

**Appellant,**

**v.**

**STATE OF WEST VIRGINIA,**

**Appellee.**



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*Appeal from the Circuit Court of Putnam County, West Virginia*

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**BRIEF OF APPELLANT**

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**BRIEF OF APPELLANT**

**I. THE KIND OF PROCEEDING AND THE NATURE OF THE  
RULING IN THE LOWER TRIBUNAL**

This Appeal stems from the Orders of the Circuit Court of Putnam County, West Virginia in Case No. 05-F-126. The Defendant was charged with seven criminal charges, all arising out of one incident with the alleged victim, B.D. The Indictment giving rise to Case No. 05-F-126 charges the Defendant with two counts of sexual assault in the second degree; two counts of sexual assault in the third degree; sexual abuse in the first degree; sexual abuse in the third degree; and battery. At the pretrial stage of this matter and

following multiple *in camera* hearings, the Trial Court denied that the Defendant's request to present evidence of the alleged victim's sexual relationship with an individual other than the accused and misrepresentations to law enforcement regarding that relationship. The Trial Court also denied the Defendant's Motion to Suppress his statement given to a Putnam County Sheriff's Deputy.

Following the denial of the Defendant's above referenced Motions, the Defendant entered a Plea Agreement with the State of West Virginia pursuant to *Rule 11(a)(2) of the West Virginia Rules of Criminal Procedure*, whereby the Defendant specifically reserved the right to appeal the adverse rulings set forth above. Pursuant to said Plea Agreement the Defendant entered a plea of guilty to Count No. 3 of the Indictment: sexual assault in the third degree under *W.Va. Code, Chapter 61, Article 8B, Section 5* and the State dismissed Count Nos. 1, 2, 4, 5, 6 and 7 of the Indictment.

The Plea Agreement states specifically that the above referenced adverse rulings "resulted in the suppression of evidence which would substantially affect the State's ability to prosecute the Defendant as charged in the indictment." The written Plea Agreement was executed by the Defendant, his counsel, and the Assistant Prosecuting Attorney. The Trial Court accepted the Plea Agreement and ordered it filed and made a part of the official record of this case pursuant to an Order entered the 31<sup>st</sup> day of October, 2006. The Defendant did not provide a factual basis for the Plea Agreement.

By Order entered the 28<sup>th</sup> day of December, 2006, the Court sentenced the Defendant to an indeterminate term of imprisonment not less than one year nor more than five years. The Court further ordered that the Defendant shall receive credit for time served on said sentence in the amount of two hundred sixteen (216) days. The Defendant objected to the Court's ruling regarding the credit for time served on the basis that he is entitled to credit for time served in addition to the two hundred sixteen (216) days ordered

by the Trial Court. The Trial Court further Ordered the Defendant be placed on supervised release for ten (10) years following his release from incarceration on the underlying sentence.

The Defendant petitioned this Court for Appeal from the rulings of the Circuit Court of Putnam County, West Virginia as set forth above with the Final Order entered the 28<sup>th</sup> day of December, 2006.

## **II. STATEMENT OF THE FACTS OF THE CASE**

### **A. Facts Related to Credit for Time Served**

The proceedings below were initiated by a Criminal Complaint filed in the Magistrate Court of Putnam County, West Virginia charging the Defendant with sexual assault on the alleged victim, B.D. The victim shall be described in this Brief as B.D. because of her under-age status. The Defendant was arrested on April 8, 2005 and waived his preliminary hearing which bound him over for Grand Jury presentment. The Magistrate Court Felony Case was assigned Case No. 05-F-121. The undersigned counsel did not represent the Defendant in Magistrate Court on this charge but the records indicate that the Defendant did not post bond and remained incarcerated pursuant to that case number pending his Grand Jury Indictment.

The Defendant's bound over case was presented to the July 2005 Term of the Putnam County Grand Jury resulting in Indictment No. 41 charging the Defendant with two counts of sexual assault in the second degree; two counts of sexual assault in the third degree; sexual abuse in the first degree; sexual abuse in the third degree; and battery. All of the charges in the Indictment arose out of one incident with the alleged victim. They were also the result of the Magistrate Court case that had been bound over to the Grand

Jury. The seven count indictment was assigned Case No. 05-F-95 and assigned to Circuit Court Judge Spaulding.

The Defendant did not post bond on Case No. 05-F-95 and remained incarcerated pursuant to the arrest from April 8, 2005. The Defendant was arraigned on July 27, 2005, and a trial was scheduled for October 4, 2005, at 9:00 a.m. The parties appeared before Judge Spaulding on September 12, 2005, for a pretrial hearing. At this pretrial hearing the State of West Virginia moved to dismiss the indictment on the basis that it had erroneously charged the Defendant with "sexual intercourse" in Counts 1 through 4 of the Indictment when the Indictment should read "sexual intrusion". Judge Spaulding dismissed the Indictment at the request of the Prosecuting Attorney over the objections of the Defendant.

The State of West Virginia again presented this case to the November 2005 term of the Putnam County Grand Jury resulting in a seven count indictment which is identical to the indicted case previously dismissed by the State labeled 05-F-95 except the word "intrusion" is substituted for "intercourse". This new indictment on the same charges was assigned Case No. 05-F-126 and assigned to Putnam County Circuit Judge Eagloski. An Order was entered by Judge Eagloski on November 18, 2005 requiring the Defendant to appear before the Court on December 1, 2005 at 8:30 a.m. and makes no reference to bond. By Order entered December 28, 2005, the Trial Court states that the Defendant appeared before the Court on the 5<sup>th</sup> day of December, 2005, in person and by counsel for arraignment. The Order notes that the Court reduced the Defendant's bond from \$50,000.00 to \$37,500.00. On December 19, 2005, a Justification of Surety was filed with the Circuit Clerk of Putnam County, West Virginia effectively posting bond in the amount of \$37,500.00. However, the Defendant remained incarcerated at Western Regional Jail pursuant to a jail sentence from another charge.

The Defendant was released from Western Regional Jail in February, 2006, and absconded. The Defendant was re-arrested on May 20, 2006, and has remained incarcerated at Western Regional Jail through the day of the filing of this Brief. At sentencing the Trial Court only granted the Defendant credit from May 20, 2006 to the sentencing date (216 days).

On the 9<sup>th</sup> day of August 2007, the Trial Court, *sua sponte*, reconsidered its Order regarding the Appellant's credit for time served. The Reconsideration Order grants the Defendant Four Hundred Six (406) days credit for time served as opposed to the Two Hundred Sixteen (216) days credit for time served previously ordered by the Trial Court. Therefore, the Trial Court has corrected the error with the exception of sixty-six (66) days of additional credit requested by the Appellant.

**B. Facts Related to the Trial Court's Denial of the Defendant's Request to Present Evidence of Alleged Victim's Sexual Relationship with a Third Party.**

The initial discovery provided by the State of West Virginia designates the date of the alleged offenses as the 28<sup>th</sup> of March, 2005, and the time between 1200-1300 hours. The Report of Criminal Investigation within the initial discovery packet also discloses that the alleged mode of operation is that "the Defendants held the victim down and gave her hickies all over her body and then penetrated her vagina with their fingers." Every charge of the Indictment arises out of this one alleged incident on the 28<sup>th</sup> of March, 2005.

By written Motion, the Defendant requested that the Trial Court allow the admission of certain evidence of the alleged victim's sexual contact with another individual. The Defendant stated that he will introduce direct evidence at trial that the alleged victim had a sexual relationship with another individual at the same time this

incident allegedly occurred, that this other individual placed hickies on the body of the alleged victim on more than one occasion, and that the alleged victim did not object to the activities of this other individual and, in fact, was hiding this behavior from her parents in order to protect this other person's illegal and sexual contact with the alleged victim. Importantly, the alleged victim only reported the incident at hand to the police when her mother discovered hickies as she exited the shower. She initially claims that someone she met on the Internet caused the hickies before eventually claiming that the Defendant and a Co-Defendant, Alonzo Smith, committed this assault on her.

Apparently, subsequent to the filing of this written Motion, Assistant Prosecuting Attorney, Dan Holstein, asked the alleged victim about a possible relationship with this other individual. Mr. Holstein then forwarded a letter dated April 4, 2006, to defense counsel which states the following:

*"I have one other piece of impeachment material to be disclosed. In talking with the victim on this date, she indicated that she had intercourse with another adult male, Jonathan Lewis, who is currently incarcerated pending over 200 counts of third-degree sexual assault involving two other victims, one of which is E. M., who was the victim of your client in an unrelated matter. While evidence of our victim's sexual conduct with someone else is inadmissible, it is still discoverable. Moreover, the impeachment value is this: before making the admission to me, she had twice denied the same to both Detective Johnson and Trooper Gonzalez, who investigated the Lewis matter."*

Jonathan Lewis is the other perpetrator which the Defendant alleges committed illegal sexual conduct with the alleged victim. Any conduct between Jonathan Lewis and the alleged victim is illegal because Mr. Lewis was well aware of the alleged victim's age, thirteen (13), and he was approximately thirty (30) years of age at the time of the alleged victim's relationship with him. At the pretrial hearing on this issue the Defendant provided an Affidavit of Witness Statement signed by the undersigned counsel. The

witness's identification was not disclosed because the Defendant had not requested discovery pursuant to Case No. 05-F-126 and, therefore, was not required to provide reciprocal discovery. The Affidavit of Witness Statement provides the following:

Now comes the undersigned counsel, Thomas H. Peyton, and states that an individual witness on behalf of the Defendant, Joshua C. Wears, can specifically testify as follows:

1. That prior to the incident which is the basis for this criminal action, this witness observed a relationship between Johnny Lewis and the alleged victim, B.D., which also took place at the witness' home.
2. That following sexual encounters between B.D. and Johnny Lewis, the witness would observe hickies upon the body of the alleged victim, B.D.
3. The alleged incident which gives rise to this criminal action, according to the victim, occurred on the Monday following Easter, 2005. The witness can testify that the alleged victim and Johnny Lewis were at the witness' home Easter weekend where it is presumed they had a sexual encounter as they had on multiple weekends in the past.
4. Johnny Lewis and the alleged victim slept together at the witness' home on occasions after the incident which gives rise to the current criminal action against Joshua C. Wears.
5. The alleged victim has talked to the witness about these incidents and the witness has direct visual knowledge of a sexual relationship between Johnny Lewis and the alleged victim.
6. The Sunday just prior to the alleged incident which gives rise to this criminal action, the witness observed hickies on the body of the alleged victim after she had spent a night with Johnny Lewis.
7. The witness will state that the hickies resulted from the alleged victim's sexual encounter with Johnny Lewis.

8. It is the witness' understanding that the alleged victim's parents were not aware of this illegal (statutory rape) relationship between Johnny Lewis and the alleged victim.
9. At one point, the witness was told by the alleged victim that the alleged victim believed she was pregnant as a result of her sexual relationship with Johnny Lewis.
10. The alleged victim has accused the Defendant and a co-defendant of placing hickies on her body and other sexual contact, but not sexual intercourse. It appears the alleged victim was concealing her relationship with Johnny Lewis from law enforcement and her parents.

The above set forth evidence is taken directly from statements of the witness.”

In a hearing on this Motion conducted October 26, 2006, the parties argued their positions and the Circuit Court denied the Defendant's Motion to present testimony regarding the relationship between Mr. Lewis and the alleged victim. By a written Order entered November 22, 2006, the Court made the following findings:

1. That the defense witness may testify about seeing "Hickies" on the alleged victim's body on Sunday, March 27, 2005, **PROVIDED**, that the alleged victim first indicates that all the "Hickies" came from the activities of Lonzo Smith and Joshua C. Wears; and
2. The evidence regarding the alleged victim's motive for lying to law enforcement is excluded at this time.

The Defendant argued in his written Motion that the alleged victim's misrepresentations to law enforcement create material issues of credibility for the purpose of impeachment. Further, the Defendant argued, both in his written Motion and at the hearing, that evidence of the alleged victim's secret relationship with Johnny Lewis provides a motive for her to blame the Defendant to cover her sexual relationship with

Mr. Lewis. Certainly there is evidence that the alleged victim was attempting to hide her relationship with Mr. Lewis as she had lied to a Putnam County Sheriff's Detective and a West Virginia State Trooper about her relationship with Mr. Lewis. Further, the alleged victim did not contact law enforcement or notify her parents of this alleged incident with the Defendant until her mother discovered hickies on her body when she exited the shower. She then blamed someone she met on the Internet prior to blaming the Defendant. There is no physical or forensic evidence that connects the Defendant to the incident alleged by the victim. The State's case consisted of the hickies photographed on the body of the alleged victim and her testimony about what happened to her.

### **III. ASSIGNMENTS OF ERROR RELIED UPON ON APPEAL**

- A. The Trial Court erred when it granted the Defendant no more than two hundred sixteen (216) days of credit for time served prior to his sentencing date.**
  
- B. The Trial Court erred when it denied the Defendant's request to present evidence of the alleged victim's sexual relationship with another perpetrator and her misrepresentations to law enforcement regarding that sexual relationship which the Defendant sought to introduce as evidence of the alleged victim's motive to fabricate charges against the Defendant.**

### **IV. POINTS AND AUTHORITIES RELIED UPON AND DISCUSSION OF LAW**

- A. The Trial Court erred when it granted the Defendant no more than two hundred sixteen (216) days of credit for time served prior to his sentencing date.**

The Defendant in this matter was arrested on the 8<sup>th</sup> day of April, 2005, regarding the incident which is the subject of this Brief. He did not post bond and remained incarcerated through his Indictment at the July 2005 term of the Putnam County Grand Jury. He remained incarcerated at Western Regional Jail and did not post bond following his appearance at the Arraignment. By Order entered September 20, 2005, Circuit Judge Spaulding dismissed the Indictment at the request of the Prosecuting Attorney and over the objection of the Defendant. The Defendant remained incarcerated at Western Regional Jail as the result of a sentence on a previous charge.

On November 18, 2005, the Defendant was again indicted for the exact same offenses that were voluntarily dismissed by the State of West Virginia pursuant to the September 20, 2005 Order. The Defendant did not post bond on the November 2005 Indictment until December 19, 2005. Subsequently, the Defendant absconded and was re-arrested on May 20, 2006 through the date of his sentencing hearing December 21, 2006.

The Court granted the Defendant credit for time served of two hundred sixteen (216) days which accounts for his incarceration from May 20, 2006 through December 21, 2006. Despite the objection of defense counsel, the Trial Court refused to grant the Defendant any additional credit for time served. The Defendant asserts that he is entitled to credit for time served beginning April 8, 2005, when he was arrested, through December 19, 2005, when he posted bond. The amount of credit to which the Defendant asserts he is entitled to, in addition to the two hundred sixteen (216) days, is set forth as follows:

April 8, 2005.....	23 days
May, 2005.....	31 days
June, 2005.....	30 days
July, 2005 .....	31 days
August, 2005 .....	31 days
September, 2005.....	30 days

October, 2005 .....	31 days
November, 2005 .....	30 days
December 1 – December 19, 2005 .....	<u>19 days</u>
Total.....	256 days

Therefore, the Defendant asserts that he is entitled to four hundred seventy-two (472) total days of credit for time served as of the date of his sentencing hearing. The Defendant argued for additional credit for time served at the December 21, 2006 sentencing hearing. The pre-sentence report noted that the Defendant would receive two hundred sixteen (216) days of credit for time served and therefore the Defendant lodged an objection to that portion of the pre-sentence report. Following defense counsel's oral objection and argument for credit for time served on the dismissed case number, the Court inquired of the State's position. Assistant Prosecuting Attorney Larry Frye states the following:

PROSECUTOR FRYE: And, your Honor, I haven't checked into that so I don't know what credit he's got. But, certainly, it would be my position *if he was in jail on these charges previously and they were dismissed, I think he would still be entitled credit for that.*

(See December 21, 2006 Sentencing Transcript at page 5).

The Court proceeded to deny the Defendant's request for time served by stating as follows:

THE COURT: Well, the thing of it is, he wasn't in jail on these charges because those charges indicated it was sexual intercourse, and here it's intrusion. If it was the same offense, I could see that. So I'm going to overrule your objection, but it's so noted.

(See December 21, 2006 Sentencing Transcript at pages 5-6).

Clearly, the Court committed reversible error when it found that the Defendant entered a plea to charges different from those arising out of his initial arrest in Magistrate Court and the July 2005 Indictment. The Prosecutor made a mistake in the July 2005 Indictment inserting the word "intercourse" when it meant to insert the word "intrusion." The Indictment was dismissed over the objection of the Defendant, but an identical Indictment was returned in the November 2005 Grand Jury session with the exception of the substitution of the word "intrusion" for "intercourse."

The West Virginia Supreme Court of Appeals held the following in Syllabus Point 1 of Martin v. Leverette:

1. The Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution require that credit for time spent in jail, either pre-trial or post-trial, shall be credited on an indeterminate sentence where the underlying offense is bailable.

Martin v. Leverette, 161 W.Va. 547, 244 S.E.2d 39 (1978).

The West Virginia Supreme Court of Appeals also held the following in Syllabus Point 6 of State v McClain:

6. The Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution require that time spent in jail before conviction shall be credited against all terms of incarceration to a correctional facility imposed in a criminal case as a punishment upon conviction when the underlying offense is bailable.

State v. McClain, 211 W.Va. 61, 561 S.E. 2d 783 (2002).

In the case at hand, the Defendant was in jail, pretrial, where the underlying offense is bailable beginning the date of his arrest on April 8, 2005. If the Court's ruling in this matter is allowed to stand, the State of West Virginia could arrest a defendant

pursuant to a criminal complaint filed in magistrate court, bind them over for grand jury presentment, indict them with an erroneous indictment, dismiss the indictment over the defendant's objection, and thereby deprive the defendant of all credit for time served prior to the dismissal by the State. The Assistant Prosecuting Attorney seemed to recognize the potential consequence of not granting the Defendant credit for this time served in jail because he states on the record "if [the defendant] was in jail on these charges previously and they were dismissed, I think he would still be entitled to credit for that."

Fundamental fairness, as well as the previous holdings of this Court in Martin and McClain, do not permit the State of West Virginia to deprive the Defendant of credit for time served on these charges simply because the State of West Virginia voluntarily dismisses the charges over the objection of the Defendant only to recharge him with the same offenses at the next term of Court. Therefore, the Defendant respectfully requests this Honorable Court reverse the ruling of the Trial Court and grant him four hundred seventy-two (472) days of total credit for time served through the day of his sentencing hearing on December 21, 2006.

As noted previously in this Brief, the trial has entered an Order reconsidering the above ruling and granted the Defendant four hundred six (406) days of credit. Therefore, only sixty six (66) days remain in controversy. These remaining days result from the Prosecution's voluntary dismissal of the initial indictment as a result of the State's error in drafting the Indictment. The dismissal was over the objection of the Defendant because he did not want to lose his credit for time served as he remained in jail on another charge. Admittedly, the record indicates that the Defendant was not jailed for these charges between the dismissal and his reindictment. In other words, the dismissal apparently released the bond he had previously posted and then a new bond was set after his reindictment in November.

It is unfair that the Defendant is denied credit for time he would have received but for the State's mistake in drafting the indictment. This Court has emphasized that credit for time served issues implicate Constitutional Equal Protection. In this case, the Defendant was not given credit for the sixty-six (66) days he spent in jail requiring him to spend a longer period of incarceration than a person who was not the victim of the State's negligence in drafting an indictment.

**B. The Trial Court erred when it denied the Defendant's request to present evidence of the alleged victim's sexual relationship with another perpetrator and her misrepresentations to law enforcement regarding that sexual relationship which the Defendant sought to introduce as evidence of the alleged victim's motive to fabricate charges against the Defendant.**

The Rape Shield Statute does not prohibit the Defendant from presenting evidence of the alleged victim's relationship with another perpetrator under the facts of this case. Further, excluding the introduction of her false statements to law enforcement about this relationship violates the Defendant's Sixth Amendment rights under the Confrontation Clause of the *Constitution of the United States* and his due process right to a fair trial.

During the pretrial stage of the underlying proceeding the Defendant moved the Court to allow him to present evidence at trial of a sexual relationship between the alleged victim and another perpetrator because the alleged victim had lied to a Putnam County Sheriff's detective and a West Virginia State Trooper about her relationship with another perpetrator. The evidence of the falsity of her statements to the law enforcement officers is derived from a letter drafted and signed by a former Assistant Prosecuting Attorney from Putnam County, Dan Holstein.

Specifically, the alleged victim made an admission to Mr. Holstein that she did have a sexual relationship with another perpetrator, Jonathan Lewis, who happened to be

charged with over 200 counts of third-degree sexual assault. (The alleged victim was not a victim of the specific charges filed against Mr. Lewis.) According to Mr. Holstein, this information was provided to defense counsel because it had impeachment value to the extent the alleged victim had twice denied a sexual relationship with Jonathan Lewis to both Detective Johnson and Trooper Gonzalez. In addition to the lies to law enforcement officers, the Defendant proffered to the Court through an Affidavit of counsel that another witness could corroborate an ongoing secret relationship between the alleged victim and Jonathan Lewis. Mr. Lewis' *modus operandi* is consistent with the only physical evidence (hickies) found on the alleged victim in this case.

Although as a general matter, the Rape Shield Statute, *West Virginia Code § 61-8B-11*, bars the introduction of evidence, in a sexual assault prosecution, concerning specific instances of the victim's sexual conduct with persons other than the Defendant, if the Trial Court finds that there is a strong probability that the alleged victim of a sexual offense has made other statements which are false of being the victim of sexual misconduct, evidence relating to those statements may be considered by the Court outside of the scope of the Rape Shield Law. Syllabus Point 4, State v. Quinn, 200 W.Va. 432, 490 S.E.2d 34 (1997).

According to Syllabus Point 3 of State v. Quinn, a defendant who wishes to cross examine an alleged victim of a sexual offense about or otherwise introduce evidence about other statements that the alleged victim has made about being the victim of sexual misconduct must initially present evidence regarding the statements to the court out of the presence of the jury and with fair notice to the prosecution, which presentation made in the court's discretion may be limited to proffer, affidavit, or other method that properly protects both the rights of the defendant and the alleged victim and effectuates the purpose of the Rape Shield Law.

In the case *sub judice*, the Defendant provided both a proffer and an Affidavit at a pretrial hearing with fair notice to the Prosecuting Attorney that he intended to introduce evidence about other statements that the alleged victim had made regarding her sexual relationship with Jonathan Lewis. Unless former Assistant Prosecuting Attorney Dan Holstein was lying in his letter to defense counsel, the alleged victim had lied on at least two occasions to law enforcement officers about her relationship with Jonathan Lewis. While she first denies the relationship and then admits the relationship, it remains a lie and becomes highly probative when taken in combination with the nature of her hidden relationship with Mr. Lewis.

In State v. Quinn the West Virginia Supreme Court of Appeals affirmed the trial court's exclusion of the proposed evidence because the only evidence the defendant had of falsity of the alleged victim's statements was the denial of the other alleged perpetrators she had accused. In contrast, the Defendant in this case has substantial proof of the falsity by and through a letter from the former Assistant Prosecuting Attorney and two law enforcement officers.

The defendant in State v. Quinn filed a *habeas corpus* proceeding in the U.S. District Court which was appealed to the Fourth Circuit Court of Appeals. See Quinn v. Haynes, 234 F.3d 837 (4<sup>th</sup> Cir. 2000). Quinn argued before the Fourth Circuit that to limit his ability to offer impeachment evidence violated his Sixth Amendment right under the Confrontation Clause. The Fourth Circuit noted the distinction between impeachment evidence proving bias and impeachment of general credibility:

[The distinction] is important because generally applicable evidentiary rules limit inquiry into specific instances of conduct through the use of extrinsic evidence and through cross-examination with respect to general credibility attacks, see *W.Va.R.Evid. 608*, but no such limit applies to credibility attacks based upon  **motive**  or bias. See *W.Va.R.Evid. 404(b)*; 4 Jack B. Weinstein et al., *Weinstein's Federal Evidence* § 607.04(1) (2d. ed. 2000)

“Since bias of a witness is always significant in assessing credibility, the trier of fact must be sufficiently informed of the underlying relationships, circumstances, and influences operating on the witness to determine whether a modification of testimony reasonably could be expected as a probable human reaction.” (footnote omitted); see also Davis, 415 U.S. at 317, 94 S.Ct. 1105 (“[T]he jurors were entitled to have the benefit of the defense theory [or witness bias] . . . so that they could make an informed judgment as to the weight to place on [the witness’s] testimony . . . .”); Chavis v. North Carolina, 637 F.2d 213, 225 (4<sup>th</sup> Cir. 1980) (recognizing that Davis stands for the principle that “[o]ne of the most important factors affecting credibility is the presence of any bias, prejudice or incentive on the part of a witness to favor one party to the litigation”).

In Davis, one of the leading Confrontation Clause cases regarding the right to cross-examination for the purpose of impeachment, the Court noted this distinction between attacks on the general credibility of the witness and a more particular attack on credibility “effected by means of cross-examination directed toward revealing possible biases, prejudices, or **ulterior motives of the witness** as they may relate directly to issues or personalities in the case at hand.” Davis, 415 U.S. at 316, 94 S.Ct. 1105. Justice Stewart, in his concurring opinion, emphasized “that the Court neither holds nor suggests that the Constitution confers a right in every case to impeach the generally credibility of a witness through cross-examination about his past delinquency adjudications.” Id., at 321, 94 S.Ct. 1105. (Stewart, J., concurring); see also Hughes v. Raines, 641 F.2d 790, 793 (9<sup>th</sup> Cir. 1981) (drawing the same distinction between general credibility attacks and attacks on motive or bias and applying it to distinguish Davis from attempts to introduce prior false allegations of sexual abuse).” Quinn v. Haynes, 234 F.3d 837, 845 (4<sup>th</sup> Cir. 2000).

The Fourth Circuit denied Quinn's appeal in part because his “intended presentation of impeachment evidence was to attack T.M.’s general credibility, rather than her potential bias or **motive** to fabricate charges.” Quinn v. Haynes, 234 F.3d 837, 845 (4<sup>th</sup> Cir. 2000).

In the case *sub judice*, the Defendant sought to introduce evidence of the alleged victim’s secret and illegal relationship with Jonathan Lewis as a motive to fabricate her claim against the Defendant. She was caught red-handed when her mother discovered

“hickies” on her body as she exited the shower. The alleged victim’s lies to law enforcement demonstrate she was attempting to hide her ongoing “consensual” relationship with Jonathan Lewis.<sup>1</sup> Further, the nature of her relationship is verified by the third-party witness whose testimony was proffered through counsel’s affidavit.

In Olden v. Kentucky, 488 U.S. 227 (1988), the United States Supreme Court of Appeals addressed a similar issue where a defendant alleged that his Sixth Amendment right to confront witnesses had been violated by the “trial court’s refusal to allow him to impeach [the victim’s] testimony by introducing evidence supporting a motive to lie.” Olden, 488 U.S. at 230. In Olden, the victim, a young white female, accused the defendant, a black man, of raping her. The victim had an ongoing relationship with another man at the time of the alleged rape. The defendant alleged that he had intercourse with the victim but it was consensual. It was also clear that the victim exited the defendant’s vehicle at the home of the man with which she had an ongoing relationship. The defendant sought to introduce the victim’s relationship with this other man to demonstrate she had a motive to lie about the defendant in order to protect her relationship with this other man, who may have grown suspicious upon seeing her exit the defendant’s vehicle. The lower courts denied his request to present this evidence.

The United States Supreme Court of Appeals reversed the lower court and found that the defendant’s Sixth Amendment rights had been violated. The Court noted that the defendant consistently asserted that the victim had concocted the rape allegation against him out of fear of jeopardizing her relationship with this other man. Olden, 488 U.S. at 232. Similarly, in the case *sub judice*, Mr. Wears asserts that the alleged victim in this

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<sup>1</sup> The sexual acts between the alleged victim and Jonathan Lewis cannot be consensual because of the age difference. However, it appears she voluntarily participated in the relationship and denied the existence of the relationship to two different law enforcement officers. She is clearly a victim of Jonathan Lewis. Unfortunately, to the knowledge of the undersigned counsel, Mr. Lewis has never been charged in relation to his illegal, abusive and psychologically traumatic behavior toward this child victim.

case is concocting the rape allegation against him in order to protect her relationship with Jonathan Lewis.

Just as the lower courts in Olden, the Trial Court's denial of this Defendant's request to present evidence of the alleged victim's relationship with Jonathan Lewis violated his constitutional right to confront his accuser and present his valid and reasonable theory of the case.

In addition to cross-examination regarding false statements of an alleged victim of sexual assault pursuant to Syllabus Points 3 and 4 of State v. Quinn, the West Virginia Supreme Court of Appeals has established exceptions to the Rape Shield Statute. In this case, assuming the proffered evidence falls within the scope of the Rape Shield Statute, it is still admissible as an exception to the general rule. The West Virginia Supreme Court of Appeals has designated two exceptions to the general rule excluding evidence of specific acts of sexual conduct of a victim in a sexual assault prosecution which are set forth in Syllabus Point 3 and Syllabus Point 6 of State v. Guthrie. Syllabus Point 3 of State v. Guthrie states as follows:

*Rule 404(a)(3) of the West Virginia Rules of Evidence provides an express exception to the general exclusion of evidence coming within the scope of our Rape Shield Statute. This exception provides for the admission of prior sexual conduct of a rape victim when the trial court determines in camera that evidence is (1) specifically related to the act or acts for which the defendant is charged and (2) necessary to prevent manifest injustice.*

Syllabus Point 3, State v. Guthrie, 205 W.Va. 326, 518 S.E.2d 83 (1999).

In the case *sub judice*, the evidence the Defendant wishes to introduce, direct and circumstantial evidence that someone other than the Defendant committed the sexual acts that are alleged in the indictment, is specifically related to the act for which the Defendant

is charged, and its admission is necessary to prevent manifest injustice. The third party witness' testimony provides direct substantive exculpatory evidence that is absolutely necessary for the Defendant to present his defense. Further, the evidence which the defense intended to produce at trial supports his theory of the case that the alleged victim fabricated her claim against the Defendant to cover her relationship with Jonathan Lewis.

In Guthrie, the West Virginia Supreme Court of Appeals upheld the exclusion of DNA evidence that proved that the alleged victim had sexual intercourse with another person. However, the Court should consider Footnote 8 which states the following:

We would reach a different result had Mr. Guthrie sought to introduce the DNA evidence, without more, as substantive exculpatory evidence of his innocence. However, the purpose for which Mr. Guthrie sought to use the DNA evidence was to inform the jury that, prior to the charged offense, Mrs. Guthrie had had sexual intercourse with other men and that she lied about this fact to hospital officials.

In the case *sub judice*, Mr. Wears can offer direct evidence that is substantive and exculpatory.

The Trial Court's exclusion of evidence of the alleged victim's sexual conduct with Jonathan Lewis violated the Defendant's due process right to a fair trial. The West Virginia Supreme Court of Appeals set forth the test to determine whether a trial court's exclusion of evidence under the Rape Shield Statute violates the Defendant's due process right. Syllabus Point 6 of State v. Guthrie states as follows:

The test used to determine whether a trial court's exclusion of proffered evidence under our Rape Shield Law violated a defendant's due process right to a fair trial is (1) whether that testimony was relevant; (2) whether the probative value of the evidence outweighed its prejudicial effect; and (3) whether the State's compelling interests in excluding the evidence

outweighed the defendant's right to present relevant evidence supportive of his or her defense.<sup>2</sup>

In the case *sub judice*, the alleged victim's sexual contact with Jonathan Lewis is clearly relevant to this case because it directly links Mr. Lewis to the criminal offenses for which the Defendant is charged. Further, the probative value of the evidence is so important that it cannot be outweighed by any prejudicial effect. Without the evidence of the alleged victim's secret relationship with Mr. Lewis the jury is left with a victim who was clearly marked with "hickies" and the Defendant will have no opportunity to explain who placed the "hickies" on her body. As a further explanation, the Defendant must have the opportunity to explain why the alleged victim would accuse him instead of Mr. Lewis. Additionally, considering the State was prosecuting the Defendant for multiple felony and misdemeanor offenses and if he is convicted he will be forced to register as a sex offender for the rest of his life, his right to present relevant evidence supportive of his defense outweighs any interest the State has in excluding the evidence.

As recently as 2006 the United States Supreme Court of Appeals has emphasized the limitations upon a state court when it seeks to exclude relevant evidence. In Holmes v. South Carolina, 547 U.S. 319 (2006), the Court reiterated "whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." Holmes, 547 U.S. 319 (2006) citing Crane v. Kentucky, 476 U.S. 683, 690 (1986). The Holmes' Court went on to state that "just because the prosecution's evidence, if credited, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case. And where the credibility of the prosecution's witnesses or the reliability of its evidence is not conceded, the strength of

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<sup>2</sup> Footnote 19 of Guthrie explains that this test is also applicable for a confrontation clause analysis.

the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact[.]” Holmes, 547 U.S. at \_\_\_\_.

In the case *sub judice*, the Defendant has identified a third party who has a *modus operandi* of preying on females under the age of sixteen and direct evidence that his *modus operandi* regarding his victim in this case results in “hickies” upon the body of the victim. Even assuming the Defendant cannot produce “smoking gun” direct evidence of the third party’s guilt, this 404(b) type evidence alone provides sufficient evidence of the third party’s guilt in order to make it relevant and admissible. Other crimes or bad acts evidence is often employed by the State in order to prove motive, identity, design or plan on the part of a charged defendant.<sup>3</sup>

At least one Federal District Court has addressed a situation where a Defendant sought to use *modus operandi* or 404(b) evidence to demonstrate a third party’s guilt. In Wilson v. Firkus, No. 06-CV-00199 (N.D.Ill. 10-20-2006), the Northern District Court of Illinois found “[t]here can be no rational basis for permitting the prosecution to introduce other crimes evidence while prohibiting the defendant from using this same type of evidence in his defense.” Wilson at 35. The evidence in the case *sub judice* is more probative than that usually propounded by the prosecution in a sexual assault case because it involves the same victim as well as other victims very similar to his victim in this case.

The evidence the Defendant sought to present at trial falls squarely within the exceptions to the general prohibitions of the Rape Shield Statute and the Trial Court clearly abused its discretion when it excluded the evidence of the third party’s guilt.

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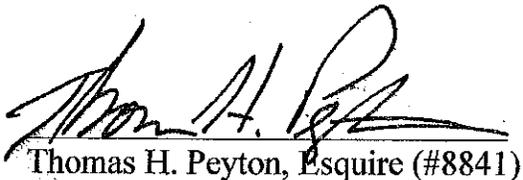
<sup>3</sup>In fact, the State was permitted by the Trial Court to use 404(b) evidence in this case following a pretrial hearing based solely upon hearsay from an investigating officer.

**V. PRAYER FOR RELIEF**

WHEREFORE, for these and other errors which are apparent upon a fair reading of the transcripts and on the record, your Appellant prays that this appeal be granted and that the Orders of the 29<sup>th</sup> Judicial Circuit be reversed.

Respectfully submitted this 2<sup>nd</sup> day of November, 2007.

**JOSHUA C. WEARS**  
BY COUNSEL



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**BEFORE THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA**

**No. 33529**

**JOSHUA C. WEARS,**

**Appellant,**

**v.**

**STATE OF WEST VIRGINIA,**

**Appellee.**

**CERTIFICATE OF SERVICE**

I, Thomas H. Peyton, counsel for Appellant, Joshua C. Wears, do hereby certify that the foregoing "BRIEF OF APPELLANT" was served upon the following counsel of record via hand delivery, this 2<sup>nd</sup> day of November, 2007:

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