

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE EX REL, J.W.,  
Petitioner,

v.

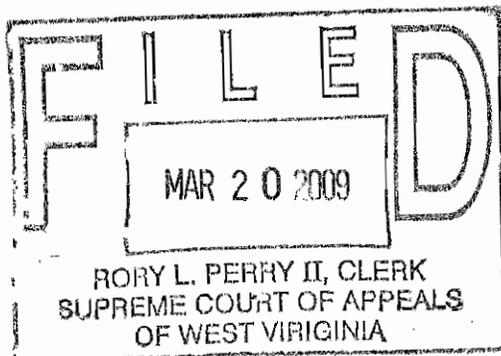
Criminal Action No: 08-F-143-DK

THE HONORABLE DAVID W.  
KNIGHT, SENIOR STATUS JUDGE,  
CIRCUIT COURT OF MERCER COUNTY,  
Respondent.

Case No: \_\_\_\_\_

COPY

REPLY TO APPLICATION FOR WRIT OF PROHIBITION



BY: WILLIAM FLANIGAN, ESQ. [#1217]  
c/o SANDERS, AUSTIN, FLANIGAN  
& FLANIGAN  
320 Courthouse Road  
Princeton, WV 24740  
(304) 425-8125

and DAVID B. KELLEY, ESQ. [#1996]  
P. O. Box 632  
Bluefield, VA 24605  
(276) 326-2110

Counsel for Jason W. [REDACTED]

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**REPLY TO APPLICATION FOR WRIT OF PROHIBITION**

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**I.  
STATEMENT OF FACTS**

Jason W [REDACTED] stands charged in the Circuit Court of Mercer County with four [4] counts of sexual assault in the first degree and one [1] count of incest. He faces 70-160 years in the West Virginia Penitentiary relating to allegations made by his younger sister. [*W.Va. Code § 61-8B-3; 61-8-12*].

Jason W [REDACTED] had been inducted into the United States Army and was days away from completing basic training when he was arrested on an Indictment that is based solely on the uncorroborated testimony of his younger sister, J.W. J.W. is now 15 years of age [see attached "MySpace" photo]. J.W. has made allegations to the State's forensic expert (play therapist) that Jason had repeatedly, and sometimes forcibly, raped her from age 6 through age 12. The attacks began in Arizona and continued through the family's many moves until they ended up living on Cumberland Road and Union Street in Bluefield, Mercer County, West Virginia.

J.W.'s description of what had occurred between her and her brother changed markedly from that she had revealed to other professionals before the referral to the State's forensic expert.

J.W. was examined by Dr. Fared M. Hussain, M.D., of the Prudich Medical Center in Montcalm, West Virginia on August 16, 2005. This examination was part of the Mercer County Board of Education's efforts to have J.W. re-introduced to the formal education system over the objection of her father. Part of the examination dealt with questions relating to whether she had ever been molested, abused, etc. Her responses to Dr. Hussain were all in the negative.

J.W. did evidence signs of Attention Deficit Disorder and Dr. Hussain referred her to Lawrence Richmond, a licensed psychologist with Laurel Ridge Psychiatric Associates. During that evaluation, her father, who was present, reports that she had told him that she had been sexually molested and abused by her brother. The evaluator recommended counseling by a female counselor, but J.W.'s father refused that option.

Mr. Richmond continued to see J.W. over several visits in a professional capacity and she denied, during those examinations and treatments, that she had ever been sexually penetrated by her brother. She described several touching incidents by the accused, but specifically denied sexual penetration or sexual intercourse. She also reported to the psychologist some abnormal behaviors within the family, including a female friend of the father who had told her that she would be raped and killed and chopped up into pieces at some point in her life [she was 7 at the time of this disclosure]. She also talked about witnessing the same female friend of her father sexually molesting her then 12-year-old brother when she was living in Arizona.

Mr. Richmond was a mandatory reporter and made a referral to the appropriate authorities. J.W. was then interviewed by Sergeant Melissa Clemons on January 13, 2006 of the West Virginia State Police. Sergeant Clemons is an investigator who specializes in investigating and prosecuting sexual offenses against children. She does many forensic interviews and did a forensic interview of J.W. J.W. specifically denied during that interview that she had ever had sexual intercourse or been sexually penetrated by Jason W [REDACTED]

J.W., however, did reveal to Sergeant Clemons certain unusual occurrences that had taken place in her family. She reported, for example, that she slept with her father. She indicated that her father liked to tickle her all over and that she likes it when her father tickles her. She further reported that she liked laying on the couch, side-by-side, with her father because she "liked laying with him." She revealed her father had beaten her dog with such ferocity it bled from its eyes and nose. Finally, J.W. disclosed all the children were subject to very stern discipline until one came forward and admitted the misconduct---except her.

With respect to Jason, J.W. indicated that he had only touched her one time when they moved into the house that they are in now on Union Street in Bluefield, West Virginia and that he had never threatened her. She did say he had touched her around her privates when they lived in other States. [Both would have been underage during this time period]. None of the siblings reported ever witnessing any untoward behavior directed at J.W. by either her father or by her brother, Jason W [REDACTED]

No charges were brought against Jason based on these pre-referral statements. The Indictment actually was brought two years later after Jason W [REDACTED] was inducted into the United States Army and after J.W. participated in "sessions" with a registered play therapist,

Phyllis Hasty, who has been a member of the State's prosecution team for sexual molestation cases in Mercer County for some time.

It was well into those sessions, which occurred over many months, that J.W. completely changed her accounts of her interactions with Jason W [REDACTED] and now alleged repeated sexual intercourse of a forcible and traumatic nature spanning six years and encompassing activities in several States.

The State did not utilize a forensic physical examination of J.W. after these startling new disclosures were made---even though J.W.'s new account was directly contradictory of the statements she had made to other professionals.

Jason W [REDACTED] through counsel, moved under *State v. Delaney*, 417 S.E.2d 903 (W.Va. 1992), for an Order requiring a physical examination by a Court-designated, female physician to determine whether hymen injury was present. Jason W [REDACTED] is a fairly large young man and, if true, the forcible, traumatic penetrations that had begun at age six [6] and continued until J.W. was twelve [12] should have produced hymen damage.

The Court considered the age of the accuser---now age 15 (the child in *Delaney* was 7 or 8); the limited nature of the exam; the fact such exams routinely are done in sexual assault cases, often at the insistence of the prosecution; and the fact that the literature shows no significant psychological damage risks for young women in J.W.'s age group. The Court was apprised of the compelling need for the evidence by the defense, as it may prove exculpatory in a largely "she said/he said" case. The Court also noted the evidence was unavailable through any other means. [Tr. Hearing, Feb. 3, 2009, pgs. 1-29; Tr. Hearing, Jan. 27, 2009, pgs. 1-22].

After weighing the **Delaney** factors, the Trial Court granted the defense's request, but established very strict guidelines to minimize the intrusion to J.W.:

The examination would be limited to assessing hymen injury. It would be done by a female gynecologist approved by the prosecution and scheduled by the prosecution. The results would be submitted to the Trial Court for *in camera* review. The results would only be disclosed if the Trial Court believed the results probative to a claim by the defense or an element of proof for the prosecution.

The examination has been scheduled---which the State seeks to block by its application for a Writ of Prohibition.

**II.**  
**THE STATE OF WEST VIRGINIA HAS NOT MET THE**  
**REQUIREMENTS FOR THE ISSUANCE OF A**  
**WRIT OF PROHIBITION**

The State of West Virginia effectively is exercising an interlocutory appeal from a decision of a lower tribunal relating to a matter committed to the Trial Court's discretion. There is no question that the decision of the Trial Court is within its jurisdiction to make and that it is exercising its legitimate powers in deciding whether to order a physical examination of the accuser. **State v. Delaney, supra.**

This Court, in deciding whether to issue a Writ of Prohibition in circumstances in which the Lower Court is properly exercising its jurisdiction, has stated it will be guided by a five [5] factor test. The most important factor bearing on the issue is whether the Petitioner has shown the challenged Order was a "clear error as a matter of law." **Syl. Pt. 1, State ex rel, Cline v. Frye, 672 S.E.2d 303 (W.Va. 2008); Syl. Pt. 4, State ex rel, Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12 (1996).**

A Writ of Prohibition will not issue “to prevent a simple abuse of discretion by a Trial Court. It will only issue where the Trial Court has no jurisdiction or having such jurisdiction exceeds its legitimate powers.” **W.Va. Code § 53-1-1; Syl. Pt. 2, State ex rel, Peacher v. Sencindiver**, 160 *W.Va.* 314, 233 *S.E.2d* 425 (1977); **Syl. Pt. 1, State ex rel, Nelson v. Frye**, 221 *W.Va.* 391, 655 *S.E.2d* 137 (*W.Va.* 2007).

The State has a very high burden in circumstances in which it makes the claim that a Trial Court, though acting within its jurisdiction, nevertheless abused its legitimate powers. The Supreme Court has held that the State must demonstrate that the Trial Court’s action was so flagrant “that it [Prosecution] was deprived of its right to prosecute the case or deprived of a valid conviction.” **Syl. Pt. 1, State v. Angell**, 216 *W.Va.* 626, 609 *S.E.2d* 887 (*W.Va.* 2004).

This Court has made it plain that it will not substitute its judgment for the judgment of the Trial Court when the Trial Court is exercising powers legitimately granted to it. The inquiry in such circumstances involving an application for a Writ of Prohibition essentially comes down to whether the Trial Court committed a legal error “plainly in contravention of a clear statutory constitutional or common law mandate which may be resolved independently of any disputed facts ... .” **Syl. Pt. 1, Hinkle v. Black**, 164 *W.Va.* 112, 262 *S.E.2d* 744 (1979).

The Trial Court, here, weighed the defendant’s Motion for a physical examination under the standards appropriately set by this Court in **Delaney**. **Syl. Pt. 3, State v. Delaney**, 417 *S.E.2d* 903 (*W.Va.* 1992). **Delaney** was designed to protect the defendant’s need for evidence while, at the same time, minimizing the intrusiveness or dilatorious effect on the accuser who would have to undergo multiple physical examinations when she was of a tender age.

This accuser was not of a tender age. She was 15 at the time of the request. She had not been physically examined at any time, even though such an examination is typically done in these types of cases by the prosecution. This absence of a report, for the defense to review with its own expert, together with the exculpatory potential of the evidence, supplied the element of a compelling need to have a limited, confidential examination done by a qualified female gynecologist under circumstances in which the results would not be published to either the defendant or the State until they had been reviewed, *in camera*, by the Court.

Physical examinations of an alleged sexual assault victim or sexual abuse victim are routinely done in most States AT THE INSISTENCE OF THE PROSECUTION. The results of such examinations are routinely admitted into evidence to buttress the State's case that penetration has occurred. See, e.g., **Hogan v. West**, 448 *F.Supp. 2d* 496 (*W.D. NY* 2006); **People v. Prentiss**, 172 *P.3<sup>rd</sup>* 919 (*CO App. Ct.* 2006); **State v. Green**, 951 *So. 2<sup>nd</sup>* 1226 (*LA App. 5<sup>th</sup> Cir.* 2007); **State v. Young Bok Song**, *S.W. 3<sup>rd</sup>* 2005, *WL* 2978972 (*TN Crim. App. Ct.* 2005); **People v. Espinosa**, 204 *W.L.* 1560376 (*Cal. Dis. Ct.* 2004). There is nothing sinister or unique about this type of examination and it oftentimes is sought by the prosecution.

Defendants, moreover, have to routinely submit to potentially embarrassing or humiliating or inculpatory examinations, even though they have the supposed protection against self-incrimination. **Schmerber v. California**, 384 *U.S.* 757, 86 *Sup. Ct.* 1826 (1966).

An accused can be forced to submit to a blood test. An accused can be forced to give a voice exemplar; a fingerprint exemplar. He can be forced to be photographed. He can have DNA samples taken. HIV Screens run. If he has peculiar, physical attributes that may bolster the credibility of an accused, he can be forced to display, either in photograph or in

person, those characteristics for the benefit of the truth-finding mission of the jury. See, **Schmerber v. California**, 384 U.S. 757; see, also, **Holt v. United States**, 218 U.S. 245 (1910); **Gilbert v. California**, 388 U.S. 263, 87 Sup. Ct. 1951 (1967); **United States v. Wade**, 388 U.S. 218, 87 Sup. Ct. 1926 (1967).

The principles of due process and the truth-finding mission of our jury system require the defendant to submit to examinations in many cases that are intrusive, embarrassing, humiliating and potentially incriminating.

The same is true of the accuser. There are circumstances in which there is a compelling need, on the part of a defendant, for a physical examination of the accuser when the evidence is not available through another source and the evidence sought may be exculpatory. **Delaney, supra**.

Ordinarily, this type of matter would be handled by the defense employing its own medical doctor to review the results of a medical examination ordered by the State as part of its prosecution of the case. The defendant's rights are protected in such a circumstance because he has an independent qualified person looking at the results of the original physical examination and the accuser is protected because she does not have to undergo repeated examinations. **Delaney, supra**. Here, there is no underlying or primary examination to review.

This request is far from unprecedented in this same Circuit. Judge Swope had ordered just such an examination in a case involving a much younger alleged victim several months earlier and the examination took place with no appeal or Writ of Prohibition filed with this Court by this very same prosecutor. [**State of WV v. Virgil Eugene Shrader, Criminal Action No: 08-F-117-DS**].

This accuser is 15 years of age. She is physically mature and has been regularly and routinely seen by various psychologists, police investigators and play therapists associated with the allegations contained in the State's Indictment. None of those evaluations or examinations show that discussing the details of her allegations has in anyway caused her psychological trauma or long-term psychological effects. It certainly would pose no greater emotional upset than the State has already submitted her to to have her undergo a discreet, confidential physical examination by a qualified female medical doctor to determine if there is any physical evidence that this 15-year-old has had repeated traumatic intercourse from age 6 onward.

The Circuit Court, furthermore, took appropriate steps to protect and minimize any disclosure of the results. The Court ordered that the examination be arranged by the State of West Virginia and that it had the power to select the examiner. It ordered that the examination be undertaken by a female gynecologist and that female gynecologist has consented to undertake the examination. The Court further ordered that the results and report be submitted to the Court, *in camera*, and that the Court would determine, after its review, whether there was any evidence that was probative, either for the prosecution or for the defense.

There is great peril for the defense in insisting on an examination of the type the prosecution ordinarily would do to bolster its case. It may be better Trial strategy to lambaste the State at Trial for failing to secure such a vital piece of physical evidence and cross-examine the accuser regarding her many denials of sexual penetration or intercourse. A Trial has, as its primary function, truth-finding. It should not be reduced to a "roulette

wheel” gamble on who the jury believes when a vital, conclusive piece of evidence, readily available through a confidential medical exam, will assist the jury in determining that truth.

**III.**  
**THE CIRCUIT COURT’S DECISION WAS**  
**PROPERLY GUIDED BY *DELANEY***

In *State v. Delaney*, 187 W.Va. 212, 417 S.E.2d 903 (1992), the Supreme Court was confronted with the issue of multiple physical and psychological evaluations for 7 and 8-year-old victims. It established six [6] factors to guide a Trial Court’s decision about examinations with a special emphasis on protecting children of tender years from multiple intrusive examinations. Id. The **Delaney** considerations have been fully satisfied by the Trial Court here.

The **Delaney** Court counseled the Trial Judge considering an examination request to make the determination based on the following factors:

- (1) the nature of the examination requested and the intrusiveness inherent in that examination;
- (2) the accuser’s age;
- (3) the resulting physical or emotional effects of the examination on the victim;
- (4) the probative value of the examination to the issue before the Court;
- (5) the remoteness in time of the examination to the alleged criminal act; and
- (6) the evidence already available for the defendant’s use. Id.

The Trial Court, in the case in review here, plainly was cognizant of these factors in its decision.

The defense requested and the Court granted a very limited physical examination of the hymen of a 15-year-old young woman. The examination is to be completed by a female gynecologist to be selected by the prosecution [this examination has already been scheduled]. The results of the examination are to be presented to the Trial Court, *in camera*, and it is to make the determination as to whether the examination reveals evidence that is exculpatory to the defendant, as required under **Brady v. Maryland**, 373 U.S. 82 (1963), or corroborative of the accuser's changed version of her interactions of her brother when they were much younger. No one can doubt that a trained and Board certified female gynecologist is capable of performing this type of examination in a non-intrusive manner. It is the type of examination that not only sexually molested females undergo, but women in the general population undergo.

With respect to the accuser's age, J.W. is 15 years of age. **Delaney** dealt with repeated evaluations or multiple physical or psychological evaluations of 7 or 8-year-olds. Research done by Dr. David Clayman, as reported to the Trial Court, shows that there is nothing in the research to indicate that someone in this accuser's age group is psychologically harmed by such an evaluation, as opposed to children of tender years. The Trial Court properly considered the resulting physical or emotional effects of the examination on the accuser and properly concluded that those were minimal in this age category of victim.

The probative value of the examination to the issue before the Court simply cannot be doubted. The accuser had made three [3] statements that basically described her interactions with her brother over a course of several months. This included statements to a Board certified physician; a licensed psychologist; and a trained investigator in sex crimes against children. In all of those sessions, J.W. denied that there had ever been sexual penetration or

sexual intercourse between her brother and herself. Once she was referred to the State's "expert", who routinely testifies for the prosecution in sex crime cases, the accuser's account changed to the point that she now alleges that she was repeatedly, forcibly penetrated from age 6 through age 12. The examination at issue is necessary to determine whether there is physical evidence in the form of injury or damage to the hymen that either contradicts or corroborates this changed account of her interactions with her brother.

The element of "remoteness in time" is satisfied by the fact that the injury a child would sustain through repeated traumatic sexual intercourse with a large male will show scarring, damage to the hymen, or the absence of a hymen for years and years. If the defense were seeking a gynecological examination for the purposes of collecting semen samples, certainly the examination would be remote in time in connection with the issue being addressed. However, in a circumstance where the new allegation is that this 15-year-old young woman, when she was between the ages of 6 and 12, suffered repeated, forcible sexual intercourse with a much larger male, the physical injuries associated with that interaction would be palpable for years and years to come.

The final **Delaney** factor is also satisfied--that is, the evidence is not available from any other source. The heart of the **Delaney** restrictions is to protect the child of tender years from repeated psychological or physical examinations. There has been no physical examinations of this young woman of any kind. If there was available to the defense such an examination, the defense would be able to employ an expert simply for the purposes of reviewing those results rather than subjecting the young woman to another physical exam. That is not an option here. The evidence is available in one form and one form only and that is through a physical examination.

**IV.**  
**STATE'S POSITION EFFECTIVELY BLOCKS THE DEFENDANT**  
**FROM *BRADY* MATERIAL**

The unfairness of the State's position is self-evident. The State is possessed of and controls a key piece of evidence---physical evidence of whether the accuser has been repeatedly and traumatically raped from age 6 through age 12. The evidence is retrievable by a qualified medical doctor, with minimal intrusion to the patient, and without any psychological effects as documented by a literature search by Dr. David Clayman.

The State has subjected the accuser to the testing it desires---namely, referral to a forensic "expert" who, though not a licensed psychologist, is permitted to "work with the victim" until an account helpful to the State's prosecution is elicited. Never mind that the results achieved by the "expert" completely contradicts accounts given by the accuser to a trained medical doctor; to a licensed psychologist over several visits; and to an experienced State Police investigator specializing in sexual crimes against children.

The State chooses not to do further testing, namely, a physical examination of the type that is routinely done in cases of this nature, even though the test and examination carries a high probability of either "solidifying the accuser's changed statements" or exonerating the accused of the accusation of repeatedly raping this young woman when she was a child. The evidence sought is potentially exculpatory, **Brady v. Maryland**, 373 U.S. 82, and there is no more compelling need in the defense of a case than to have access to exculpatory evidence.

At the Hearing in which this issue was being addressed by the Trial Court, the State's only objection was that the examination itself was potentially intrusive and humiliating to the accuser. It offered no psychological evidence to support this position. It did not produce the

young woman in Court for the purposes of having her testify to the Judge regarding her own feelings about such an examination. This issue, moreover, was addressed by research done by David Clayman, a Ph.D./Psychologist who routinely and regularly performs psychological evaluations at the request of the State of West Virginia. Dr. Clayman's research indicated that there is absolutely no evidence that "alleged victims" in this young woman's age category suffer permanent psychological damage as a result of a physical examination to determine injury to the hymen. He did indicate, in representations to counsel that were placed on the record, that in children of extremely tender years, there is evidence of some psychological harm associated with this type of examination.

The Trial Court had to balance the minimal effect on the accuser with the deleterious and devastating effect on the defendant if this examination was denied.

There can be no doubt that a physical examination, in certain circumstances, is intrusive. But it is an intrusion that the Courts routinely allow when necessary for the truth-finding mission of the Trial process. We see physical examinations routinely ordered in civil cases where a person is making a claim for monetary damages. See, **W. Va. R. Civ. P. 35**; See, also, **State ex rel, George B. W. v. Kaufman**, 483 S.E.2d 852 (W.Va. 1997); **State ex rel, By Letts v. Zakaib**, 189 W.Va. 616, 433 S.E.2d 554 (W.Va. 1993). In civil cases, the "good cause requirement" is met, in many instances, in which the contest is about whether the defendant will have to pay monetary damages. Certainly, when a person's freedom is at risk as opposed to a person's "pocketbook", the Trial Court has discretion to order an examination that is performed in a respectful environment by a qualified expert, under circumstances in which the literature indicates will have *de minimus*, if any, psychological effects.

**V.  
SUMMARY**

The Trial Court ordered this physical examination after considering the factors articulated by **Delaney**. It was exercising its legitimate, decision-making authority in a case over which it held unquestionable jurisdiction. It neither committed "a clear error of law" nor made a decision that effectively denied the State the ability to make its case. **Syl. Pt. 1, State v. Angel, 216 W.Va. 626, 609 S.E.2d 287.** Extraordinary relief by way of a WRIT OF PROHIBITION is simply unavailable to the prosecution in these circumstances.

Respectfully submitted this the 19<sup>th</sup> day of March, 2009.

**JASON W** [REDACTED]

BY: SANDERS, AUSTIN, FLANIGAN  
& FLANIGAN  
and DAVID B. KELLEY, ESQ.



WILLIAM FLANIGAN, ESQ.  
WV STATE BAR ID NO: 1217  
320 Courthouse Road  
Princeton, WV 24740  
DAVID B. KELLEY, ESQ.  
WV STATE BAR ID NO: 1996  
P. O. Box 632  
Bluefield, VA 24605  
*Counsel for Jason W* [REDACTED]

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CERTIFICATE OF SERVICE

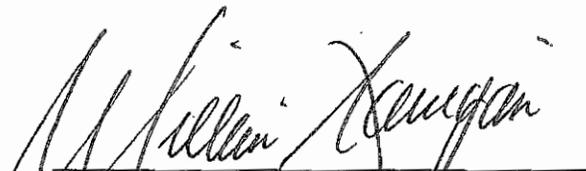
I, WILLIAM FLANIGAN, counsel for Jason W [REDACTED], do hereby certify that I have served a true copy of the following: **REPLY TO APPLICATION FOR WRIT OF PROHIBITION** upon all involved parties, by mailing a true and exact copy thereof, by United States Mail, postage prepaid, to their following addresses, on this the 19<sup>th</sup> day of March, 2009:

Deborah K. Garton, APA  
c/o Mercer County Prosecutor's Office  
120 Scott Street, Suite 200  
Princeton, WV 24740

David B. Kelley, Esq.  
P. O. Box 632  
Bluefield, VA 24605

Hon. David W. Knight, Special Judge  
c/o Circuit Court of Mercer County  
1501 Main Street, Suite 200  
Princeton, WV 24740

Mr. Jason W [REDACTED]  
Route 4, Box 480  
Princeton, WV 24740

  
Counsel for Jason Wilson