IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

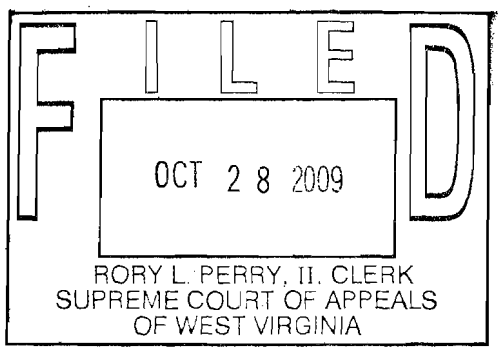
v.

DARRELL EUGENE SMITH,

Appellant.

Supreme Court No. 35133

Circuit Court No. 07-F-289
(Kanawha)



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PROCEEDINGS AND RULINGS BELOW

Darrell Eugene Smith (Mr. Smith), age 62, a former employee of the State Treasurer's Office and a former Vice-President of the Lions Club who has received awards for community service (11/13/08 Transcript of Trial Proceedings (11/13/08 Tr.) 22, 25-27), was tried in the Kanawha County Circuit Court for sexually abusing his two granddaughters, B.S. and N.S.[1], ages 11 and 14, respectively. Smith testified and vehemently denied these charges. (7/23/08 Tr. 80-109). Mr. Smith's testimony was supported by several witnesses, including attorneys Walt Wagner, Jr. and Jesse Forbes who testified to Mr. Smith's character for truthfulness. (7/23/08 Tr. 12-19) Mr. Smith presented evidence that the girls' mother, his daughter-in-law, Anita S., had a motive to press these charges against him as he had offered to pay for his son, John S., to divorce her after several years of marital problems. (7/23/08 Tr. 89-90). Defense counsel further proffered evidence in a pretrial motion that B.S.'s and N.S.'s pretrial allegations were the result of suggestive questioning during interviews by DHHR and the Dunbar Police and that the girls were coached by their mother. (4/10/08 Tr. 5, 9-11).

Based on this evidence, provided by Dr. Fred Krieg, a clinical psychologist with 30 years experience, defense counsel moved the trial court to hold a pretrial taint hearing to determine whether the coaching and suggestive interviews had contaminated B.S.'s and N.S.'s memories to such a degree as to render their testimony inadmissible at trial without violating Mr. Smith's due process right to a fair trial. (4/10/08 Tr. 5). However, the trial court denied the motion on the grounds that West Virginia law did not authorize such a suppression hearing. (4/10/08 Tr. 11-

[1] Since juveniles are involved, Mr. Smith will use their initials, consistent with this Court's practice. *In re Cesar L.*, 221 W.Va. 249, 252 n. 1, 654 S.E.2d 373, 376 n. 1 (2007).

12). The court did not reach the merits of the motion or make any findings of fact relevant to whether the motion should be granted. *Id.*

Pursuant to the court's ruling on the taint hearing motion, B.S. and N.S. testified at trial. During B.S.'s testimony, she uttered inadmissible Rule 404(b) evidence – that Mr. Smith allegedly abused B.S.'s and N.S.'s little sister, A.S., as well. (7/22/08 Tr. 189). Defense counsel moved for a mistrial, but the court denied the motion, ruling instead that the prosecutor could cure the problem by directing the witness to state that she only had personal knowledge regarding her own allegation. (7/22/08 Tr. 190-93).

On July 24, 2008, the jury returned a verdict of guilty of two counts of First Degree Sexual Abuse and five counts of Sexual Abuse by a Parent, Guardian, or Custodian. (7/24/08 Tr. 88-89). On November 13, 2008, Mr. Smith was sentenced to an indeterminate 10-20 years each for counts II, IV, and VI (Sexual Abuse by a Custodian) to run consecutively with one another, and concurrent with an indeterminate sentence of 1-5 years each for Counts IX and XI (Sexual Abuse in the First Degree) and also concurrent with 10-20 years each for counts X and XII (Sexual Abuse by a Custodian), for a total indeterminate sentence of 30-60 years. (11/13/08 Tr. 40-45).

STATEMENT OF FACTS

B.S. and N.S. grew up in a sexually charged environment in which their parents neglected them even in times of serious illness. B.S. described her life as a "living nightmare," in which she, at the age of 11, had to wake up at 6:30 every morning to take care of her baby sister so that her parents could enjoy their sleep. (7/23/08 Tr. 118). Their parents, Anita S. and John S., did not even take serious notice of B.S.'s illness until after she spent two weeks in bed, unable to move any further than the bathroom. (7/22/08 Tr. 209-210). By the time Anita S. and John S. sought treatment, her cancer, as she was eventually diagnosed as having, had gotten so bad that she was hospitalized for about two years. (7/22/08 Tr. 187-88).

Compared to how little attention they paid to their five children, Anita S. and John S. paid an inordinate amount of attention to sexuality. As testified to at trial by several friends and relatives, the girls' father would frequently make sexual jokes around the children, pornographic materials were sitting out in plain sight within the home, and the mother would talk about her sex toys and bring them out to show house guests – all in front of the children. (7/22/08 Tr. 257-258; 7/23/08 Tr. 32-35, 43, 66-67, 91-92). When first asked about inappropriate language and paraphernalia, Anita S. first stated there is nothing in her home to be found, and that one could ask anyone who has ever visited her house and that they would confirm this. (7/22/08 Tr. 249). However, when she was confronted with the proffered testimony of house guests who would attest to her language, sexual paraphernalia and pornography, she argued that a box of pornographic material could not fit where the witnesses thought she kept her paraphernalia. (7/22/08 Tr. 258). She next denied that anyone ever visited her house. *Id.* She subsequently admitted this was not true, but stuck to her original testimony that there were no pornographic

materials anywhere in her house. (7/22/08 Tr. 258-260). Her husband did admit that he and his wife had such materials in the home. (7/23/08 Tr. 190).

Against this background, when a friend told B.S. that her father had sexually abused her, B.S. reflected back that she too had been abused. (7/22/08 Tr. 207-208). The friend told B.S. that if she did not tell an adult, then she would, and so because of this ultimatum B.S. told her school counselor a few days later. (7/22/08 Tr. 198, 208-09). B.S. initially said that she did not tell her mother right away because she was at school. (7/22/08 Tr. 208-209). Confronted with the fact that she waited a weekend before telling at school, B.S. stated that she lacked the courage to talk to her mother. *Id.* Pretrial, Mr. Smith's lawyers proffered a witness who would testify that Anita S. and/or her husband physically abused the children. (7/22/08 Tr. 3-6; 10/22/07 Tr. 2-3).

The counselor called Anita S. into school for B.S. to repeat the accusation. (7/22/08 Tr. 199). This occurred in early November of 2005, just a few weeks after Mr. Smith offered to pay for his son's divorce. (7/22/08 Tr. 203; 7/23/08 Tr. 89-90). N.S. and Anita S. testified that N.S. made her accusation soon after the meeting with the counselor, when Anita S. questioned N.S. about her grandfather. (7/22/08 Tr. 221, 245-46). B.S. testified that she spoke with N.S. about the allegations a few days later. (7/22/08 Tr. 211).

On November 7, 2005, DHHR interviewed B.S. and N.S. (7/23/08 Tr. 117). The interviewer was not trained to perform normal forensic interviewing assessments, and was only allowed to use a format that does not require a psychology license. (7/23/08 Tr. 113-14). However, even that format was not used. *Id.* Instead of asking open-ended questions, the interviewer asked closed, leading questions. (7/23/08 Tr. 115, 121). The interviews were insufficiently short. (7/23/08 Tr. 115). The interviewer failed to lay groundwork by establishing competency and the child's anatomical vernacular. (7/23/08 Tr. 115-16, 124-25). The

interviewer had a preconceived notion of Mr. Smith's guilt and used reinforcement to encourage the children to make accusations. (7/23/08 Tr. 120-22, 137-38, 142-43). N.S. was interviewed for only 18 minutes, and her mother was present. (7/23/08 tr. 128). Anita S. denied being present, but the interviewer noted in his recording that she was. (7/22/08 Tr. 260-61; 7/23/08 Tr. 117). The mother may also have been present for B.S.'s interview with DHHR, which was only 23 minutes long. (7/23/08 Tr. 116-117).

Two months later, the girls were interviewed by the police. Each interview was only 6 minutes long, and not only was the mother present for both girls' interviews but she answered for B.S. at one point. (7/23/08 Tr. 123, 174-75). B.S. also attributed one of her answers to her mother. (7/23/08 Tr. 124). B.S. reflected the anatomical language of the interviewer (pee-pee) instead of using her own words. (7/23/08 Tr. 124-26). At other points, B.S. used uncharacteristically adult language. (7/23/08 Tr. 125, 127). Additionally, B.S. was inconsistent, indicating that Mr. Smith had her touch him, whereas this was not mentioned before. (7/23/08 Tr. 126). N.S. also contradicted her DHHR interview by denying that there was oral sex, while also adding an allegation that he ejaculated onto her. (7/23/08 Tr. 145-47, 157-61).

Defense expert Dr. Fred Krieg, a clinical and school psychologist, reviewed these interviews pretrial and testified that they were unreliable, invalid, and coached. (7/23/08 Tr. 147). Krieg said the inconsistencies, adult language, and Anita S.'s interference indicate coaching, and the inappropriate interviewing techniques made the content unreliable and the results invalid. *Id.* The questioning sessions did not even deserve to be called "forensic interviews," and in light of the tendency of such techniques to irredeemably "taint" a witness's memory, Dr. Krieg saw no point in interviewing the children himself. (7/23/08 Tr. 113, 148, 152, 177-178).

Based on Dr. Krieg's analysis of the children's' interviews, defense counsel moved the trial court for a taint hearing to establish that B.S's and N.S.'s statements were unreliable and should not be admitted as evidence. (4/10/08 Tr. 5). The trial court denied the motion on the ground that West Virginia law did not permit such a hearing. (4/10/08 Tr. 11-12).

Both B.S. and N.S. claimed at trial that Mr. Smith touched them on their breasts and vagina when they spent weekend nights at his house and slept in his bed with him, and that he would make them touch his penis. (7/22/08 Tr. 194-97, 218-20). N.S. said he penetrated her vagina with his finger and claimed that Mr. Smith made her perform oral sex on him and that he once ejaculated onto her. (7/22/08 Tr. 219-220). B.S. also alleged that her sister, A.S., had been abused, even though the charges relating to her had been dismissed and she was not supposed to be mentioned at trial. (7/22/08 Tr. 189, 7/21/08 Tr. 5); (7/22/08 Tr. 190-192). Because of this improper disclosure, defense counsel moved for a mistrial, but it was denied. (7/22/08 Tr. 190-192). The State also presented Robert Love's testimony that Mr. Smith told him he had spent all his money on lawyers and that he did not know why this was continuing because the girls had forgiven him. (7/22/08 Tr. 236-237).

Mr. Smith testified in his defense and categorically denied he had sexually abused his granddaughters. (7/23/08 Tr. 80-110). The allegations surprised him and many people that know him. (*See, e.g.,* 7/23/08 Tr. 81). Two licensed attorneys, Walt Wagner and Jesse Forbes, testified to Mr. Smith's character for truthfulness. (7/23/08 Tr. 12-21). Reverand Mark Thaxton, from Mr. Smith's church, also spoke on his behalf, and said he knew Anita S., that she was not a credible person, and that he would not believe her testimony. (7/23/08 Tr. 51-64).

In addition to Mr. Smith proclaiming his innocence, Anita S.'s conduct was inconsistent with a sincere belief that her daughters were abused. Several witnesses related that after the

allegations were made and after DHHR specifically told her not to, Anita S. continued to allow contact between Mr. Smith and her daughters. (7/23/08 Tr. 41-43, 52-53, 62-63, 82-83, 92). She expected Mr. Smith to take their family out to eat after church, for Christmas dinner, to attend a Mother's Day party, and to fill water balloons for the children. *Id.* Rev. Thaxton was among the witnesses testifying that Anita S. continued to allow her children to be around Mr. Smith after the allegations surfaced. (7/23/08 Tr. 52-53, 62-63).

Tracy Handley also testified for the defense that N.S. recanted and said Mr. Smith did not do anything to her. A relative of Mr. Smith's and a family friend of the girls, Tracy would often drive B.S. and N.S. home after school. (7/23/08 Tr. 24). On one of those evenings, Tracy was driving N.S. home from school and noticed that she was upset. (7/23/08 Tr. 24-25). When Tracy asked N.S. what was wrong, she said "I don't want my pawpaw to go to jail. He didn't do anything." (7/23/08 Tr. 25).

ASSIGNMENTS OF ERROR

I. The Trial Court Erred By Ruling That West Virginia Law Does Not Permit Pretrial Taint Hearings When Mr. Smith Presented Evidence That The Child Witnesses' Pretrial Statements To Authorities Were The Product Of Suggestive Questioning And Intentional Coaching.

II. The Trial Court Erred By Not Granting A Mistrial When A Prosecution Witness Introduced 404(b) Evidence That The State And Defense Agreed Would Not Be Mentioned At Trial Involving Counts Of The Indictment That Were Dismissed.

DISCUSSION OF LAW

I. The Trial Court Erred By Ruling That West Virginia Law Does Not Permit Pretrial Taint Hearings When Mr. Smith Presented Evidence That The Child Witnesses' Pretrial Statements To Authorities Were The Product Of Suggestive Questioning And Intentional Coaching.

Darrell "Gene" Smith ("Mr. Smith") received an effective life sentence[2] based on the virtually uncorroborated testimony of two young girls, N.S., age 17, and B.S., age 14, despite substantial evidence their pretrial statements from three years earlier were the result of suggestive questioning (7/23/08 Tr. 147), and the intentional coaching of their mother. (7/23/08 Tr. 124). Based on an expert opinion by clinical psychologist Dr. Fred Krieg finding that the girls' numerous interviews were inappropriately suggestive and that they displayed evidence of coaching, defense counsel moved for a pretrial hearing to determine the reliability of the girls' testimony. (4/10/08 Tr. 5-6). Without making any findings of fact or considering the merits of Mr. Smith's motion, the trial court ruled that West Virginia law did not permit the court to hold pretrial taint hearings. (4/10/08 Tr. 11-12, R. 181-82).

Defense counsel relied on *State v. Michaels*, 642 A.2d 1372, 1382-83 (N.J. 1994), a New Jersey Supreme Court case that established a procedure for reviewing the reliability of child witnesses' testimony where there are substantial questions concerning whether the children are recalling actual instances of abuse or are instead testifying to false, "tainted" memories resulting from external influences when in fact no abuse occurred. The *Michaels* court found that the testimony of tainted witnesses is an issue of reliability and admissibility, not credibility. *Id.* at 1379. Mr. Smith contends that where, as here, there is a substantial question regarding whether a

[2] Mr. Smith received a total indeterminate sentence of 30 to 60 years, with other sentences running concurrently therewith. (11/13/08 Tr. 42-45). Mr. Smith is currently 62 years old.

witness' memory is reliable or the false result of suggestive external influences, a trial court must hold a pretrial taint hearing to guarantee the defendant a fair trial based on reliable evidence.

A. Following New Jersey's Lead, Numerous Jurisdictions Have Recognized The Need To Review The Reliability Of Child Testimony In Cases where There Is Evidence Of Tainted Memories, Including Some Courts In West Virginia.

1. *Michaels* Recognized That Suggestive Pretrial Influences Can Render A Child Witness' Memory Unreliable And That Absent Sufficient Safeguards Imposed By Trial Courts, Admission of Testimony From That Witness Violates A Defendant's Right To Due Process Under The Fourteenth Amendment To The United States Constitution.

With *State v. Michaels*, the Supreme Court of New Jersey became the first to officially recognize the necessity for trial courts to conduct pretrial taint hearings to ensure the reliability of child witness testimony in appropriate cases. 642 A.2d 1372 (N.J. 1994); *See State v. Michaels: A New Jersey Supreme Court Ruling with National Implications*, 78 Mich. B.J. 32 (1999). In *Michaels*, a nursery school teacher was convicted of acts of sexual abuse against many of the children entrusted to her care. *Michaels*, 642 A.2d at 1374. The court reversed her conviction because it found the interviews of the children "were highly improper and employed coercive and unduly suggestive methods." *Id.* at 1380. The *Michaels* court began by acknowledging that "children, as a class, are not to be viewed as inherently suspect witnesses." *Id.* at 1376. Nevertheless, the court stated that both jurists' common experience and the consensus of psychological research confirm that children are more vulnerable to suggestive influences than are adults. *Michaels*, at 642 A.2d 1376-77.

Specifically, factors like a lack of investigatory independence, interviewer preconceived notions, leading questions, a lack of control of other external influences, repetition of questions, vilification of the accused, praise, mild threats, peer pressure (especially when there are multiple

accusers) and other similar influences can lead to unreliable information. *Id.* 642 A.2d. at 1377; *See also Idaho v. Wright*, 497 U.S. 805, 812-15, 110 S. Ct. 3139, 3144-3147 (1990). These factors not only lead to inaccurate responses to interview questions but can permanently alter a child's memory. *Michaels*, 642 A.2d at 1377-78. The court noted that "[o]nce this tainting of memory has occurred, the problem is irredeemable. That memory is, from then on, as real to the child as any other." *Id.* at 1378 (quoting *State v. Wright*, 775 P.2d 1224, 1228 (ID 1989), *affirmed, Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139 (1990)).

Having noted the problems that suggestive interviewing techniques pose to the reliability of child witness testimony, the New Jersey court turned to what the court's responsibility is regarding the reliability of proffered evidence. *Michaels*, 642 A.2d at 1380. The court stated that trial courts must ensure that admitted evidence is reliable enough to be useful to the trier of fact, and quoting *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253 (1977), ruled that "[r]eliability is the linchpin in determining admissibility of evidence under ... the Due Process Clause of the Fourteenth Amendment." *Michaels*, 642 A.2d at 1380. In accordance with that responsibility, the New Jersey Supreme Court held that a court confronted with the possibility of unreliable child testimony should hold a pretrial hearing pursuant to the New Jersey analog of West Virginia Rule of Evidence 104. *Id.* at 1382-83. This taint hearing should address whether the pretrial events, interviews, and interrogations "were so suggestive that they give rise to a substantial likelihood of irreparably mistaken or false recollection of material facts bearing on defendant's guilt." *Id.*; *Cf. Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 971 (1968) (standing for the proposition that live testimony concerning identity may need to be suppressed as unreliable if the witness was subjected to an impermissibly suggestive photographic array).

The defendant bears the burden of triggering such a hearing by presenting some evidence the proffered testimony is the result of suggestive or coercive practices. *Michaels*, 642 A.2d at 1383. Upon this showing, the burden shifts to the prosecution to show by clear and convincing evidence the testimony is nonetheless reliable. *Id.* Given evidence that suggestive influences have taken their toll on the child witnesses' memories, the court concluded that a taint hearing is necessary to ensure the defendant's due process right to a fair trial by reliable evidence. *Id.* at 1384-85. *See also id.* at 1380 ("Competent and reliable evidence remains at the foundation of a fair trial, which seeks ultimately to determine the truth about criminal culpability. If crucial inculpatory evidence is alleged to have been derived from unreliable sources due process interests are at risk.").

2. Many Jurisdictions, Including Some West Virginia Circuit Courts, Have Agreed With The New Jersey Supreme Court's Reasoning In *Michaels* To Require A Pretrial Determination Of The Reliability Of Child Testimony Where There Is Evidence Of A Potentially Tainting Influence Upon The Child's Memory.

Since *Michaels*, several other jurisdictions have officially sanctioned pretrial taint hearings, and trial courts in others are holding such hearings without their appellate courts having weighed in on the issue – including West Virginia. Some states consider their competency hearings to be best suited for this purpose. *See, e.g., Commonwealth v. Delbridge*, 855 A.2d 27, 47 (Pa. 2003). Those states include Pennsylvania, Wyoming, and Washington. *See Id.*; *English v. State*, 982 P.2d 139, 147 (Wyo. 1999); *State v. Carol M.D.*, 983 P.2d 1165, 1166 (Wash. 1999). Additionally, Minnesota's competency statute calls for an *in camera* hearing that extends to issues of taint. *See Defendants' Rights in Child Witness Competency Hearings: Establishing Constitutional Procedures for Sexual Abuse Cases*, 69 Minn. L. Rev. 1377, 1383-84

(1985). Other courts, such as those in Massachusetts more or less follow the procedure outlined in *Michaels*. *See Commonwealth v. Callahan*, 9 Mass.L.Rptr. 228 (Mass.Super. 1998) (not reported in N.E.2d); *See also People v. Michael M.*, 618 N.Y.S.2d 171, 177-78 (N.Y. Sup. Ct. Kings County, 1994). Still others have avoided deciding on a formal procedure all together, and leave it to the totality of the circumstances. *Fischbach v. State*, 676 A.2d 902 (Del. 1996) (Table Opinion). All of these jurisdictions, though, recognize that issues of taint are too serious to go to the jury without some sort of pretrial screening. *See, e.g., Michaels*, 642 A.2d at 1375.[3]

Also, some trial courts in West Virginia are already holding pretrial taint hearings. These West Virginia courts have found *Michaels* to be persuasive, and have ruled not only that state law permits such hearings, but that in the circumstances of those cases such hearings were required. The Berkeley County Circuit Court recently ordered a pretrial taint hearing in a child sexual abuse case. A copy of the order granting this hearing is lodged with the Clerk of the Supreme Court because of its length. Also, Dr. Krieg testified in a taint hearing in Mercer County before Mr. Smith's trial. (4/10/08 Tr. 5). This Court must provide guidance to those West Virginia circuit courts that are not yet permitting taint hearings by ruling that due process

[3] Not all courts that have considered the issue of whether to hold taint hearings have permitted them. *See, e.g., State v. Bumgarner*, 184 P.3d 1143, 1151-52 (Or.App. 2008) (*modified by State v. Bumgarner*, 229 Ore. App. 92 (2009)). Often, these courts are confusing taint with general competency to testify or are failing to distinguish between credibility and reliability, of which only the former is a jury issue in the first instance. *See Nelson v. State*, 1999 Alas. App. LEXIS 130, 7-12 (Alaska App. 1999) (Not reported in P.3d); *Johnson v. State*, 2004 Tex. App. LEXIS 10133, 8 (Tex.App.-Waco 2004) (Not reported in S.W.3d); *Pendleton v. Commonwealth*, 83 S.W.3d 522, 525-26 (Ky 2003) (Not reported in S.W.3d); *State v. Olah*, 767 N.E.2d 755, 760 (Oh App. Ct. 2001). Such cases fundamentally miss the point – taint hearings do not pertain to whether witnesses can testify generally and answer questions based on their recollection but instead go to whether their testimony itself is reliable and therefore admissible evidence. *See State v. Farley*, 192 W.Va. 247, 254 (1994) ("...[R]eliability is the linchpin in determining admissibility of evidence under a standard of fairness that is required by the Due Process Clause of the Fourteenth Amendment..." *quoting Michaels*, 642 A.2d at 1380 (N.J. 1994)).

requires them to do so when there is substantial evidence of external influences tainting the child witness' testimony.

B. Contrary To The Trial Court's Ruling, West Virginia Law Permits Courts To Hold Preliminary Hearings On Admissibility Outside The Hearing Of The Jury And In Fact Mandates It In Appropriate Cases.

The trial court erred as a matter of law by holding that it lacked the authority to hold a pretrial taint hearing pertaining to the admissibility of the girls' testimony. Normally, failure to exclude evidence is reviewed under an abuse of discretion standard. *State v. Pettrey*, 209 W.Va. 449, 456, 549 S.E.2d 323, 330 (2001). However, "[w]here a trial court's determination involves a construction of the *West Virginia Rules of Evidence* and rulings of law, [the court's] review is plenary." *State v. Lowery*, 222 W. Va. 284, 287, 664 S.E.2d 169, 172 (2008). In the case at bar, the trial court did not rule on whether a hearing was necessary, but instead ruled that West Virginia law did not provide a mechanism to review the admissibility of this evidence pretrial. (4/10/08 Tr. 11-12). Under these circumstances, the standard of review is *de novo.* In any event, the court made no findings of fact pursuant to West Virginia Criminal Procedure Rule 12(e) that could be afforded any deference.

The trial court was mistaken in its ruling that West Virginia law does not allow a court to hold a pretrial hearing to determine the admissibility of questionable testimony at trial. West Virginia Rule of Evidence 104(a) states that preliminary questions of admissibility are within the court's judgment, not the jury's. WVRE 104(a). Reliability, when properly distinguished from

credibility, is an issue of admissibility for the trial judge. *Farley*, 192 W.Va. at 254 (1994).[4] In a variety of other circumstances, it is clear not only that reliability is a question of admissibility, but also that justice requires that it be screened pretrial so that only useful, non-misleading evidence goes before the jury. *See* WVRE 104(c). *See also People v. Michael M.*, 618 N.Y.S.2d 171, 176 (N.Y. Sup. Ct. Kings County, 1994) ("Many of the exclusionary rules are based on a determination of the reliability of evidence.").

For example, when a court reviews the methodology of a potential expert witness' testimony, one of the pertinent questions is whether the opinion is based on reliable procedures. *See Wilt v. Buracker*, 191 W. Va. 39, 46, 443 S.E. 2d 196, 203 (1993). Likewise, for hypnotically recalled memories, competency, confessions to the police, Rule 404(b) evidence, pretrial identifications, and child hearsay statements, an overriding concern as to the admissibility of these forms of evidence is whether the proffered testimony is reliable. *See, e.g., Rock v. Arkansas*, 483 U.S. 44, 61, 107 S. Ct. 2704, 2714 (1987) (hypnosis); *State v. Stacy*, 179 W. Va. 686, 689, 371 S.E.2 614, 617 (1988) (competency) ("[T]he fact that Rule 601 has changed the terminology used to analyze the problem surrounding an infant's testimony does not significantly change the underlying problem."); *State v. Farley*, 192 W.Va. 247, 257, 452 S.E.2d 50, 60 (1994); *State v. McGinnis*, 193 W. Va. 147, 158-59, 455 S.E.2d 516, 527-28 (1994) (404(b) evidence); *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253 (1977) (eyewitness

[4] *But see Gentry v. Magnum*, 195 W. Va. 512, 466 S.E.2d 171 (1995). In *Gentry*, the court stated that reliability is a jury question. *Id.* at 528, S.E.2d at 187. However, it is clear from the context that despite the generality of the statement, the court actually means that after the court has ruled on admissibility, the jury may also take issues of reliability into account. *See Id.* In fact, earlier in *Gentry*, the court distinguished reliability from credibility, stating that the reliability of an expert's testimony is not an issue of truthfulness. *Id.* at 519, 466 S.E.2d at 178 (*quoting In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 749 (3rd Cir. 1994)).

identification); *Idaho v. Wright*, 497 U.S. 805, 818, 110 S. Ct. 3139, 3148 (1990) (child hearsay in sexual assault cases).

The above cases stand for two important propositions relating to pretrial taint hearings: first, that reliability is a question of admissibility for the judge, and second, certain types of evidence can be so prejudicial that trial court must decide the issue of unreliability outside the jury's presence. *See Michaels*, 642 A.2d at 1375 ("Like confessions and identification, the inculpatory capacity of statements indicating the occurrence of sexual abuse and the anticipated testimony about those occurrences requires that special care be taken to ensure their reliability."). Like 404(b) evidence, confessions, and eyewitness identifications, the admission of child witness testimony at trial is almost certainly damning to a defendant because jurors are ill-equipped to discriminate between honestly mistaken and honestly accurate testimony and to consider such evidence in its proper scope. *Id.*; *See also Child Sexual Assault: Children's Memory and the Law*, 40 U. Miami L. Rev. 181, 184-85 (1986); *Stacy*, 179 W. Va. at 689 (1988); *Cf. State v. Willett*, ___ W. Va. ___, ___674 S.E.2d 602, *no pinpoint cite available* (W.Va. 2009) (Ketchum, J., concurring). Therefore, also like those forms of evidence, the trial judge has an obligation to screen the proffered testimony in advance to ensure that it is sufficiently reliable to be usefully and fairly weighed by the jury. *See Farley*, 192 W.Va. at 254 (1994).

C. In The Case At Bar, Mr. Smith Presented Sufficient Evidence Of Taint To Require The Trial Court To Hold A Pretrial Hearing To Satisfy The Requirements Of Due Process.

As *Michaels* states, "[t]hat an investigatory interview of a young child can be coercive or suggestive and thus shape the child's responses is generally accepted. If a child's recollection of

events has been molded by an interrogation, that influence undermines the reliability of the child's responses as an accurate recollection of actual events." *Michaels*, 642 A.2d at 1377. The question remains whether that occurs in any individual case. The *Michaels* court believed that "all relevant circumstances" must be taken into account. *Id.* at 1381. In this case, professor of clinical psychology Dr. Fred Krieg did so, and concluded that the interviews in this case were unreasonably suggestive and that the children had in fact been coached. (7/23/08 Tr. 147).

Under circumstances such as these, the trial court is required to hear the evidence in advance and make a ruling about admissibility prior to trial. *Michaels*, 642 A.2d at 1383 ("Without limiting the grounds that could serve to trigger a taint hearing, we note that the kind of practices used here – *the absence of spontaneous recall*, *interviewer bias*, *repeated leading questions*, *multiple interviews*, incessant questioning, *vilification of defendant*, *ongoing contact with peers* and references to their statements, and the use of threats, bribes and *cajoling*, as well as the *failure to videotape* or otherwise document the initial interview sessions – constitute more than sufficient evidence to...justify a taint hearing." *Emphasis added*).

1. The Child Witnesses' Initial Allegations Were Made Under Suspect Circumstances.

The first child to accuse Mr. Smith was B.S., but her initial statement cannot fairly be construed as a true accusation. Rather than approaching an adult, or showing signs of mental trauma, B.S. simply reflected back the assertion of a friend. (7/22/08 Tr. 207-208). It was only after the friend called B.S.'s bluff by telling her to tell an adult (or else) that she approached a school counselor several days later. (7/22/08 Tr. 208-09). Accusations such as this that are made in an environment of peer pressure must be viewed with a degree of skepticism. Rather than

being mutually corroborating, multiple, similar accusations are indicative of taint if the accusers are not independent and isolated from one another. *See Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S. Cal. L. Rev. 2117, 2150-51 (1996).

Not only does this cast doubt on the circumstances of B.S.'s initial statement, but it calls into question the accuracy of N.S.'s report. We only have the largely discredited testimony of Anita and the putatively inadmissible testimony of B.S. and N.S. to support the theory that B.S. first told her counselor. (7/22/08 Tr. 197-98, 221, 245-46). Even if we give these witnesses the benefit of the doubt, it is still undisputed that several days elapsed between the sleepover and B.S.'s statement to the counselor and that B.S. did eventually speak with N.S. (7/22/08 Tr. 208-09, 211). This opportunity for taint represents the kind of mutually dependent accusations that the *Michaels* court and others worry about as problematic. *See Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S. Cal. L. Rev. 2117, 2150-51 (1996). From a credibility perspective, it *seems* like having multiple accusers bolsters the state's case, resulting in greater weight being attributed to such testimony. However, from a reliability perspective, it can be an indicator of taint. *Id.* The result is a jury placing undue weight on unreliable testimony, severely prejudicing the defendant. In the current case there is no way of knowing whether N.S.'s and B.S.'s stories are corroborating or indicate taint because there was no pretrial hearing.

2. The Children Were Subjected To Repeated, Inappropriately Suggestive Questioning That Went Against Established Protocols By The Use Of Techniques That Are Notorious For Tainting The Memory Of Children.

Although there was no taint hearing regarding Dr. Krieg's findings, he did testify at trial. (7/23/08 110-179). His ultimate conclusion was that the interviews were wholly inappropriate

and unreliable – too short, too suggestive, and not conforming to any reliable standard or protocol. (7/23/08 Tr. 147). Dr. Krieg also found evidence indicating that the girls had been coached between the interviews. *Id.*

B.S. was first confronted by her school counselor and the principal before they called in B.S.'s mother, Anita S. (7/22/08 Tr. 199). Both Dr. Krieg and the authorities relied on by *Michaels* found that the first interview is crucial; if it is done improperly and taints the child's memory, then all subsequent interviews are potentially worthless. *See Michaels* 642 A.2d at 1377; (7/23/08 Tr. 152-153). In fact, every subsequent interview has the possibility of tainting the child's memory, and so additional interviews should be done sparingly and within accepted standards if at all. (7/23/08 Tr. 177-178). However, in this case there is no record of that initial meeting and the State called neither the principal nor the counselor at trial. Nor is there any recording of how B.S.'s mother questioned her or her sisters. All we know about that questioning, if we take Anita S. at her word, is that she explicitly mentioned Mr. Smith, a practice condemned as excessively leading by *Michaels.* 642 A.2d. at 1377 (1994).

The girls were next interviewed by a CPS worker from DHHR. The interviewer lacked clinical training and so he could not perform any of the standard battery of forensic assessments. (7/23/08 Tr. 113-114). Instead, he could only perform an interview that does not require a license but is nonetheless generally adequate. *Id.* However, Dr. Krieg found that DHHR did not even do this correctly, and that the questioning did not qualify as a forensic interview at all, let alone a reliable one. *Id.* To begin, the girls' mother was present, at least for N.S.'s interview and Dr. Krieg believes for B.S.'s, too. (7/23/08 Tr. 116-17). Anita S.'s presence categorically invalidates the questioning. (7/23/08 Tr. 123). Dr. Krieg also noted that the interviews themselves were too short to be of use to a forensic examiner. With children near adolescence, the examiner should

elicit more information than with younger children (7/23/08 Tr. 115), but here the interviews for B.S. and N.S. were only 23 and 18 minutes long, respectively. (7/23/08 Tr. 116, 128).

Within that time frame, the interviewer violated almost every rule of reliability noted in *Michaels*. Dr. Krieg went through the DHHR interviews line by line and showed that almost every question was leading to some degree. *See, e.g.,* 7/23/08 Tr. 122. The interviewer engaged in mild praise, calling B.S. "sweetheart" (7/23/08 Tr., 118), encouraged her and N.S. to make inculpatory statements (7/23/08 Tr. 120), and vilified Mr. Smith (7/23/08 Tr. 120-121), by telling the girls that he is a bad man who will go to jail. (7/23/08 Tr. 122, 142-143). These are demonstrably unreliable interviewing techniques and Dr. Krieg concluded that the questioning did not even deserve to be called forensic evaluation. (7/23/08 Tr. 113).

Dr. Krieg likewise found that the police department interviews were invalid. (7/23/08 Tr. 123). This round of interviewing came two months after the DHHR interview, and suffered from similar defects. *Id.* The interviews were absurdly short (six minutes each), consisted of extremely leading questions, and the girls' mother was present. *Id.* At one point, B.S. even showed her propensity to be led by reflecting back the developmentally immature anatomical language of the interviewer, evincing that not only is suggestion possible but that it in fact did happen in this case. (7/23/08 Tr. 124-125). This reflection is all the more significant since as noted earlier, that is what prompted her initial allegation; reflecting the statement of another.

On cross-examination, the prosecutor rightly pointed out that Dr. Krieg's testimony went to the validity of the interviews, not to whether the girls were untruthful. (7/23/08 Tr. 148). However, this over-simplification misses the fundamental issue in the *Michaels* decision. The problem is not just that the interview responses are invalid (though they certainly are) – it is that the way in which those responses were elicited can taint those responses as well as the child's

memory to such an extent as to call into question the reliability of subsequent interviews and the admissibility of trial testimony. *See Michaels*, 642 A.2d 1372 at 1379. In this case, Dr. Krieg concluded that the improper interviews and coaching had so corrupted any subsequent statements by the girls that he saw no point in seeking to question the girls himself. (7/23/08 Tr. 148 and 177-178). The damage had been done, and one additional interview could not fix anything. *See Michaels*, 642 A.2d at 1377-78. The only remedy is to screen potentially unreliable testimony pretrial to determine whether it can be admitted into evidence without violating the due process rights of the defendant.

3. Dr. Krieg Found Evidence Of Coaching, The Girls' Mother Had A Motive To Coach, And Her Out Of Court Conduct Was Inconsistent With A Sincere Belief In Mr. Smith's Guilt.

In addition to the problematic interviewing techniques, Dr. Krieg further concluded from the interviews that Anita S. had coached her daughters. (7/23/08 Tr. 147). Dr. Krieg noted numerous and important inconsistencies between what the girls' said to DHHR and what they reported to the police. (7/23/08 Tr. 146-47). These inconsistencies related to the nature of the sexual acts they alleged (N.S. told the police there was oral sex but denied it to DHHR), the frequency with which the acts occurred (B.S. originally said that there were only three instances of touching, then it turned into every time she visited, almost every weekend), and the level of detail provided (B.S. and N.S. both originally reported vague instances of touching). *See, e.g.*, 7/23/08 Tr. 145-147. In younger children, Dr. Krieg stated that he would expect some variance, but with these kinds of inconsistencies and children of this age, he concluded that the differences were the result of coaching. (7/23/08 Tr. 146-147).

The presence of their mother was also a problem that pointed in the direction of coaching. (7/23/08 Tr. 123). Rather than sit back and not interfere directly, she answered a question for B.S. during the police interview. (7/23/08 Tr. 175). This occurred despite Anita S.'s claim that she knew very little about the accusations and had not pressed her daughter's for any details. (7/22/08 Tr. 261-263). Even when she was not answering for her daughters, Anita S.'s influence was apparent. Dr. Krieg found it significant that in answering a question about what Mr. Smith's wife may have known about the abuse, B.S. attributes her response to her mother. (7/23/08 Tr. 124).[5] Also, Dr. Krieg notes that in several spots, the girls' seem to be using more adult language than he would have expected from children this age based on his years in school psychology. (7/23/08 Tr. 125, 127). Even at the trial itself, the girls showed signs of continuing coaching. Both B.S. and N.S., 14 and 17, respectively, at the time of trial, evidently could not testify without being led. *See* 7/22/08 Tr. 184-205, 214-223, 233-236. Also, B.S., age 14, brought a teddy bear up to the stand with her – indicating that more than just her testimony had been coached. (7/24/08 Tr. 58-59).

It is also apparent that the girls' mother had a motive to coach her children, and that her out of court conduct toward Mr. Smith was inconsistent with that of someone who sincerely believed that her daughters had been abused. The girls' parents had an unstable relationship with multiple separations punctuating their marriage. (7/22/08 Tr. 252-53). In response to these episodes and Anita S.'s physical abuse of John S., Mr. Smith offered to pay for his son to divorce

[5] B.S. did this again during her testimony. (7/22/08 Tr. 199-200). This could indicate "stereotype induction," the process by which an interviewer (or here, a parent) expresses a belief about another individual long enough that the child picks up on it and imagines inaccurate memories of that individual that comport with the stereotype (for example, "remembering" fictional accidents caused by someone described as clumsy). *See Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S. Cal. L. Rev. 2117, 2151-53 (1996).

her once and for all – once just to his son, but also a second time in front of the Anita S., just weeks before the allegations were made. (7/23/08 Tr. 89-90).

After the allegations were made, the mother also continued to permit her children to be around Mr. Smith. Any reasonable person would expect Anita S. to keep them far away from him if she honestly believed that Mr. Smith had molested the girls. However, the evidence at trial (including Rev. Thaxton, testifying as a character witness that the mother could not be believed) showed that she still expected Mr. Smith to take their family out to eat after church, for Christmas dinner, and that, according to Mr. Smith, she even asked him to come over and help fill water balloons for the children. (7/23/08 Tr. 41-43, 52-53, 62-63, 82-83, 92). Anita S. also failed to diligently seek therapy for her children (7/22/08 tr. 264) and there is little indication that she and her husband made any efforts to reduce the "sex-charged" atmosphere that they maintained in the home.

Under these circumstances, Mr. Smith clearly was entitled to a pretrial hearing to determine whether these corrupting influences had rendered the girls' testimony unreliable and therefore inadmissible. However, the trial court did not even reach the merits of the defense motion, instead ruling that it lacked the authority to hold such a hearing. This is incorrect as a matter of law, and Mr. Smith's conviction should be reversed.

D. The Refusal To Hold A Taint Hearing Is Particularly Prejudicial Given The Scant Corroborating Evidence And The Defense Evidence In This Case.

In a case where there is substantial corroborating evidence, it may be harmless error for the trial court to dispense with holding a taint hearing. However, in cases like the one at bar where there is virtually no evidence of abuse other than the problematic accusations, a pretrial

taint hearing is essential to ensure that the defendant receives a fair trial by reliable evidence. *See Michaels*, 642 A.2d at 1382.

There is no physical evidence in this case whatsoever. The only circumstantially corroborating evidence the State put on was a statement by Robert Love to the effect that Mr. Smith supposedly told him that he had spent all of his money on lawyers and that the girls forgave him. (7/22/08 Tr. 237). This evidence is of dubious credibility. Mr. Smith has always denied the accusations. (7/23/08 Tr. 80-109, 60). Second, Mr. Smith never had to pay a lawyer. Prior to the appointment of the Public Defender Office, Mr. Smith was represented on a *pro bono* basis by attorneys Walt Wagner and Jesse Forbes, personal friends of his who did not ask for a fee. (7/23/08 Tr. 12-19). At no time did Mr. Smith have to pay anyone for legal services, despite Mr. Love's statement. (7/23/08 Tr. 88-89). For both reasons, Robert Love's testimony is thin at best.

Also, it appears from the record that the children generally lived in a state of mild neglect in a very adult, sexually-oriented environment that made it easy to make these accusations and difficult to back down. B.S. described her daily life to the DHHR worker as "a living nightmare" in reference to the fact that she, an 11 year old, had to wake up every morning at 6:30 to take care of her baby sister so her parents could sleep. (7/23/08 Tr. 118). Furthermore, when B.S. first became ill, she went two weeks without being able to leave her bed before her parents even noticed anything was wrong and took her in for treatment. (7/22/08 Tr. 209-210).

In juxtaposition to the neglect of their children, the girls' mother and father paid an inordinate amount of attention to anything sexual, and made little effort to hide the sexual atmosphere in their home from their children or visitors. Staci Kirk, Yvonne Whitlock, and Nancy Saunders testified at trial concerning visits to the girls' home during which their father,

John S., would make inappropriate sexual jokes in front of the children, Anita S. would show the witnesses (and the girls by implication) her sex toys, and also that pornographic movies were lying out in plain sight. (7/22/08 Tr. 257-258; 7/23/08 Tr. 33-35, 43, 66-67). In such an environment, it would be impossible for children to not make the connection between sexuality and attention. and when a child describes her life as a "living nightmare" because of her parents' neglect, it is easy to see how such a child could seek out that attention – positive or negative. In fact, according to Staci Kirk, on one occasion when Anita S. wanted to show her houseguests one sex toy in particular, the kids volunteered to go get it. (7/23/08 Tr. 34-35).

Reverend Mark Thaxton, the pastor of the church Mr. Smith and Anita S. used to attend, even testified to the Anita S.'s lack of trustworthiness. He stated that he had known her for about six years, and in that time had spoken with her at just about every service. (7/23/08 Tr. 52). Rev. Thaxton stated that he did not consider Anita S. to be credible. (7/23/08 Tr. 52-53). He would not believe her testimony. (7/23/08 Tr. 53).

Mr. Smith testified on his own behalf, and strenuously denied any wrongdoing. (7/23/08 Tr. 84-85, 88). He testified to Anita S. and John S. allowing him to be around B.S., N.S., and the other three daughters after the allegations were made, including an incident when their mother actually invited Mr. Smith to her home. (7/23/08 Tr. 82-83, 92). Mr. Smith also pointed out problems in the earlier testimony. N.S. claimed that the abuse started when she was five or six and occurred in Mr. Smith's home in Dunbar, WV – but Mr. Smith did not live in Dunbar until 1998, when she would have been eight. (7/23/08 Tr. 87-88). He has struggled with this condition for the entire time relevant to the accusations. *Id.* Mr. Smith also disputed Mr. Love's statement. Mr. Smith testified that he never paid any money to any lawyer and also that he never spoke with Mr. Love beyond saying "hello" or "God bless you." (7/23/08 Tr. 88-89).

Contrary to the air of unreliability that surrounds the testimony of B.S. and N.S., Mr. Smith was corroborated by a variety of witnesses. Ms. Kirk, Ms. Whitlock, and Ms. Saunders all provided testimony that reinforced Mr. Smith's assertions. (7/23/08 Tr. 33-35, 43, 66-67). Also, Messrs. Wagner and Forbes, licensed attorneys in the State of West Virginia, testified as character witnesses to Mr. Smith's truthful character. (7/23/08 Tr. 12-19). Mr. Wagner has been close friends with Mr. Smith for 30 years and testified that Mr. Smith would never lie under oath and that he was absolutely trustworthy. (7/23/08 Tr. 14). Mr. Forbes has known Mr. Smith for over 20 years, and likewise testified that Mr. Smith is trustworthy. (7/23/08 Tr. 16).

Finally, N.S. recanted. Tracy Handley, Mr. Smith's niece, testified that she contacted the girls' family and invited them to move into a trailer she owned in Cabell County to get them away from Dunbar and Mr. Smith. (7/23/08 Tr. 23-24). During the time that Tracy shared her property with the family, she became close to the girls. They were frequently home alone, and Tracy would help them with chores while she was there taking care of upkeep on her property. (7/23/08 Tr. 23-24, 26-27). Tracy lived in Putnam County, and because the girls wanted to attend schools there Anita S. would drive them to Tracy's every morning to catch the bus, and then most evenings Tracy would drive the girls back to the trailer. (7/23/08 Tr. 24). On one of those evenings, Tracy was driving N.S. home from school (B.S. was absent) and Tracy noticed that she was upset. (7/23/08 Tr. 24-25). When Tracy asked N.S. what was wrong, she said "I don't want my pawpaw to go to jail. He didn't do anything." (7/23/08 Tr. 25). Tracy told N.S. that they would have to tell her father, and when they arrived at the trailer Tracy blew her horn to attract John S.'s attention. *Id.* Still sitting in her car, Tracy explained to him what N.S. had said while N.S. sat next to her, crying. (7/23/08 Tr. 25-26). John S. responded by yelling "Too fucking late. [N.S.], get your ass in the house." *Id.* N.S. attempted to explain away this conversation in her

testimony, but what neither she nor anyone else could explain is why someone who initially believed the girls, tried to help the girls get out of that situation, and provided a home for the girls and her family, would say that N.S. recanted unless it was the truth. (7/22/08 Tr. 229-233).

Therefore, a pretrial taint hearing was needed here to protect Mr. Smith's due process right to a fair trial. Fourteenth Amendment, U.S. Constitution; Article III, § 10, W. Va. Constitution. Trial courts have the authority to hold such hearings when the defense puts on some evidence of taint. Here, the trial court denied it had this authority. In such a scenario, this court must reverse.

II. The Trial Court Erred By Not Granting A Mistrial When A Prosecution Witness Introduced Rule 404(b) Evidence The State And Defense Agreed Would Not Be Mentioned At Trial Involving Counts Of The Indictment That Had Been Dismissed.

Mere minutes into the prosecution's case-in-chief, Mr. Smith was entitled to a mistrial but one was not granted. (7/22/08 Tr. 190-192). The state's first witness, B.S., introduced unscreened Rule 404(b) "other acts" evidence to the effect that her younger sister, A.S., had allegedly been abused as well. (7/22/08 Tr. 189). West Virginia Rule of Evidence 404(b) evidence is especially prejudicial and the risk of its unfair use cannot be overstated. *See State v. Willett*, ___ W. Va. ___, ___674 S.E.2d 602, *no pinpoint cite available* (W. Va. 2009) (Ketchum, J., concurring). Demonstrating how prejudicial knowledge of "other acts" can be, during voir dire a venireperson requested to be removed from the panel because he knew there were other charges against Mr. Smith that had been dropped. (7/22/08 Tr. 26-27). This venireperson readily acknowledged that because of this information, he could not be fair to Mr. Smith, and the court did not hesitate to remove him for cause. *Id.*

This 404(b) violation occurred during the following testimony by B.S.:

> Q (by prosecutor): All right. What about your grandparents, Gene and Lee Ann (sic)? Are you close to them now?
> A. No, sir.
> Q. Why is that? Do you know?
> A. Because my grandfather hurt me and my two sisters.
> Q. How do you mean he hurt you? What do you mean?
> A. He molested me and my two sisters, [N.S.] and [A.S.].

(7/22/08 Tr. 189).

There is some evidence that this reference to A.S. possibly caught the jury's attention and left them puzzled. At the conclusion of B.S.'s testimony, one of the jurors addressed the court because he had questions he wanted the witness to answer. (7/22/08 Tr. 213-214). Mr. Smith contends that such an odd occurrence is possibly the result of the testimony concerning A.S that was left unresolved. Compounding the problem, throughout the trial A.S.'s name came up in legitimate contexts, and each occurrence would have served as a reminder of B.S.'s testimony. *See, e.g.,* 7/22/08 Tr. 250. Finally, the verdict form given to the jury was not re-numbered after the charges relating to A.S. were dropped, and the non-sequentially numbered charges would have once again tipped the jury off to the fact that there were originally more allegations – exactly the kind of information that required the judge to strike a venireperson for cause just a few days earlier. (7/23/08 Tr. 219-220) (7/22/08 Tr. 26-27).

A. The Trial Court Abused Its Discretion By Not Granting Mr. Smith's Motion For A Mistrial Where It Was Manifestly Necessary, Requiring This Court To Reverse.

This court reviews the failure to grant a mistrial under an abuse of discretion standard of review. *State v. Lowery*, 222 W.Va. 284, 288, 664 S.E.2d 169, 173 (2008). The trial court should

grant such a motion upon a showing of manifest necessity. *See Id.*; W. Va. Code § 62-3-7 (2009). In *State ex rel. Bailes v. Jolliffe*, 208 W. Va. 481, 486, 541 S.E.2d 571, 576 (2000), this Court found that a defendant's right against double jeopardy was not violated by retrial following a mistrial because one was manifestly necessary. In that case, the trial court permitted the State to introduce evidence of a crime for which the defendant was acquitted for the limited purpose of showing identity. *Id.* at 483. The defendant asked the officer who testified to the prior crime what the verdict in that case was, and the Court considered this so prejudicial to the prosecution that a mistrial was required. *Id.* at 486. Here, Mr. Smith contends that he was prejudiced to such a greater degree than the State was in *Jolliffe* that if a mistrial was manifestly necessary in that case, then one must also be necessary in this case and its denial an abuse of discretion. It is clear from the surrounding circumstances that this evidence quite possibly impacted the jury, influenced their credibility assessments of the witnesses, and foreclosed the possibility of acquittal just moments after the State's case-in-chief began. Therefore, Mr. Smith is entitled to a reversal of his conviction.[6]

B. Evidence Of Other Misconduct Is Extremely Prejudicial And There Is Grave Potential For The Misuse Of Such Evidence, Particularly Under The Facts Of This Case.

[6] Mr. Smith is aware of this Court's recent decision in *State v. White*, 678 S.E.2d 33, ___ W. Va. ___ (2009), finding that it was harmless error for a witness statement to be admitted into evidence that mentioned that the defendant was a registered sex offender. However, Mr. Smith contends that *White* is distinguishable in so far as the question of whether the evidence was admissible was brought up by the jury during its deliberations, showing that they were already disposed to receive such evidence skeptically. *Id.* at 35-36. Additionally, in applying the harmless error doctrine this Court found that the record provided "substantial and virtually unassailable" evidence of guilt, *id.* at 38, which is clearly lacking in Mr. Smith's case where there is no physical or otherwise directly corroborating evidence and the entire case is based on the unreliable testimony of B.S. and N.S.

The admissibility of uncharged misconduct is the exception, not the rule, under the West Virginia Rules of Evidence. WVRE 404(b). Accordingly, the court must screen such evidence at an *in camera* hearing to determine if the proffered evidence is relevant to an issue other than character and is more probative on that point than it is unfairly prejudicial. Syl. Pt. 2, *State v. McGinnis*, 193 W. Va. 147, 150, 455 S.E.2d 516, 519 (1994). In this case, though, there could be no screening because the prosecutor was not offering the evidence intentionally, but inadvertently elicited the slightly non-responsive testimony from B.S. (7/22/08 Tr. 191). Evidently, both the defense and the prosecution agreed that the evidence was inadmissible since those charges were dropped and the State gave no notice of intent to introduce 404(b) evidence. (7/22/08 Tr. 190-191). However, the problem with 404(b) evidence, and the necessity of a mistrial, lies not with the culpability of the party introducing it but with the grave potential for misuse of the evidence and its unfairly prejudicial value in the minds of jurors – regardless of how the jury finds out about the evidence. *See State v. Willett*, ___ W. Va. ___, ___674 S.E.2d 602, *no pinpoint cite available* (W. Va. 2009) (Ketchum, J., concurring) ("[T]he real world truth is that, when a jury hears evidence that a defendant has committed some bad acts beyond those in the indictment, the jury dispenses with any notions that the defendant is innocent and reviews the evidence from the perspective that the defendant is a 'bad person.' ").

During voir dire a venireperson even had to be removed from the panel for cause because he knew of the other acts evidence. (7/22/08 26-27). The venireperson had overheard that there were originally more counts in the indictment but that some of them had been dropped. *Id.* He did not know the content of those counts or that there was even a third accuser, but this alone was enough to prejudice him and so the court dismissed him for cause *sua sponte*. *See id.* Not only does this show how prejudicial inadmissible 404(b) evidence can be, but it also shows that

at one point in the trial one *potential* juror knowing of the "other acts" evidence was prejudicial enough to warrant his removal from the panel without even argument or a motion from counsel. *Id.* Of course, after B.S.'s testimony, all twelve jurors heard the witness state that "[M]y grandfather hurt me and my two sisters... He molested me and my two sisters, [N.S.] and [A.S.]" (7/22/08 Tr. 189). The implication is clear; if Mr. Smith could not receive a fair trial when one potential juror knew of "other acts," then he certainly could not receive a fair trial when the entire jury heard about the "other acts." The fact that the court responded more strongly when only one potential juror was tainted than when the entire jury was tainted speaks to the arbitrariness of the ruling on the mistrial motion, clearly evincing that the trial court abused its discretion. *Cf. State v. Ricketts*, 219 W.Va. 97, 101-02, 632 S.E.2d 37, 41-42 (2006).

In *Ricketts*, a trial court initially ruled certain 404(b) evidence inadmissible, but when it was introduced at trial despite the earlier ruling, the court permitted it. *Id.* at 101. This court ruled that doing so was "arbitrary and irrational" and that issuing a corrective instruction at the close of trial was an insufficient remedy. *Id.* at 101-02. Although the case at bar does not deal directly with two inconsistent rulings on precisely the same issue, the issues are clearly congruent and if one tainted venireperson must be struck from the panel, then *a fortiori* if the *entire jury* is tainted by the same evidence (in even greater detail) then it too must be struck through a mistrial and a new panel assembled.

C. The 404(b) Testimony Likely Did Not Go Unnoticed By The Jury, And Subsequent Events Served As A Constant Reminder That B.S. Had Made Additional Allegations Concerning A.S.

When B.S. testified that her grandfather abused A.S., the court's remedy after denying Mr. Smith's motion for a mistrial was to have the State direct B.S. to state that she only had personal knowledge of her own experiences. (7/22/08 Tr. 189-93). Mr. Smith declined a curative instruction at the end of the trial knowing that one would only further highlight the inadmissible testimony (7/24/08 Tr. 10), but as it turned out the damage was already done and irremediable. At the close of B.S.'s examination, one of the jurors interjected, stating that he had several questions that he would like the witness to answer. (7/22/08 213-214). This highly unusual occurrence was quite possibly caused by the inadmissible testimony concerning A.S. Its admission with no subsequent follow-up must have been puzzling to the jury. The judge of course explained that jurors do not get to examine witnesses, and that the jury can only deliberate upon the information elicited by the lawyers' questioning. *Id.* However, one could fairly conclude that the incident highlights exactly how unfairly prejudicial this testimony was and that it certainly weighed on the jurors' minds and ultimately their verdict. *See State v. Willett*, ___ W. Va. ___, ___674 S.E.2d 602, *no pinpoint cite available* (W. Va. 2009) (Ketchum, J., concurring) (footnote 1).

Further eroding even the hope of a fair trial for Mr. Smith, subsequent events served to continuously remind the jury of B.S.'s testimony concerning her younger sister. Many witnesses were asked about their relationship to the family and would name all five daughters, including A.S. *See, e.g.,* 7/22/08 Tr. 250. This otherwise innocuous, unobjectionable background information, in light of B.S.'s testimony, would serve to remind the jury over and over again about A.S. and to what B.S. had testified. Even worse, at one point N.S. testified about what had happened to her sister*s*. (7/22/08 Tr. 232). Again, standing alone this would likely have gone unnoticed, but in light of B.S.'s testimony, this slip stood out like a sore thumb.

Finally, when the jury retired to deliberate, their verdict form listed the counts of the indictment without being renumbered to reflect the removal of counts involving A.S. (7/23/08 219-220).[7] This immediately placed the jury on notice that there were originally other charges – precisely the same information that the removed venireperson had, and for which he needed to be struck for cause. (7/22/08 Tr. 26-27). During voir dire, it would have been simple for the court to instruct that venireperson that he should disregard his knowledge of other counts, but there it was an insufficient remedy, and erring on the side of caution to protect Mr. Smith's right to a fair trial, the court struck the venireperson for cause. *Id.* However, when confronted with the situation of the entire jury knowing of other charges, AND having heard B.S.'s testimony concerning her younger sister, the court found that an instruction telling the jury to disregard the numbering was sufficient. (7/23/08 Tr. 222-23). Again, the stronger response to the lesser situation pretrial than to the more problematic situation presented at trial shows the arbitrariness of the rulings and thus shows that the court abused its discretion. Therefore, Mr. Smith is entitled to a reversal of the court's erroneous ruling on his motion for a mistrial.

D. B.S.'s Unscreened Testimony Concerning A.S. Resulted In A Near Insurmountable Presumption Of Guilt That Unfairly Prejudiced Mr. Smith, Requiring Reversal.

The moment B.S. testified to inadmissible 404(b) evidence, the trial may have well as ended because Mr. Smith was as good as convicted. *State v. Willett*, ___ W. Va. ___, ___674 S.E.2d 602, *no pinpoint cite available* (W. Va. 2009) ("It is undeniable that a jury will be more inclined to convict once they hear that a defendant may have engaged in other "bad acts" – even

[7] The counts were numbered "II, IV, VI, IX, X, XI, XII." (7/23/08 Tr. 219-220).

if the defendant was never charged or convicted for that other conduct.") (Ketchum, J., concurring). As a practical matter, evidence admitted pursuant to a *McGinnis* hearing is still used by the jury as evidence of conforming conduct, but in this case Mr. Smith did not even receive the benefit of *in camera* review. *Id.* ("The niceties of a *McGinnis* analysis do little to remove the overwhelming prejudicial effect that is heaped upon a defendant in a criminal case, once a jury learns of the defendant's previous bad acts.") (quoting *State v. Scott*, 206 W. Va. 158, 168, 522 S.E.2d 626, 636 (1999) (Starcher, J., dissenting)).

Had notice been provided, and the court heard *in camera* the proffered evidence, its discretion to admit or suppress the evidence would be qualified by the duty to ensure that Mr. Smith received a fair trial. *Willett*, ___ W. Va. ___, ___674 S.E.2d 602, *no pinpoint cite available* (W. Va. 2009) (Ketchum, J., concurring) ("In the exercise of discretion to admit or exclude evidence of collateral crimes and charges, the overriding considerations for the trial court are to scrupulously protect the accused in his right to a fair trial while adequately preserving the right of the State to prove evidence which is relevant and legally connected with the charge for which the accused is being tried.") (quoting *State v. Thomas*, 157 W. Va. 656, 658, 203 S.E.2d 445, 457 (1974)). That review was impossible here because the testimony came as a surprise to the State, the defense, and the court. (7/22/08 Tr. 191). However, in ruling on Mr. Smith's subsequent motion for a mistrial, the trial court should have applied the same scrutiny this Court found necessary in *Thomas* to ensure that Mr. Smith received a fair trial.

Because the State was not seeking to admit the evidence, its exclusion could not hurt the State's case and a new trial would not be overly burdensome since the inadmissible testimony came just moments into the State's case-in-chief. Alternatively, as expressed above, Mr. Smith was put at a huge disadvantage that could only be corrected by empanelling a new jury. The

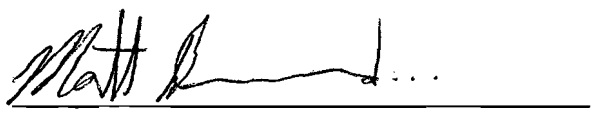
same is true now; Mr. Smith was denied his state (Article III, § 10) and federal (Fourteenth Amendment) constitutional due process rights to receive a fair trial because of the inadmissible testimony concerning A.S. and the only way to remedy that is with a new trial. Therefore, this court must reverse Mr. Smith's conviction.

RELIEF REQUESTED

For the above reasons, Mr. Smith respectfully requests this Court to reverse his convictions and sentences and remand his case for a new trial.

Respectfully submitted,

Darrell Eugene Smith
By Counsel



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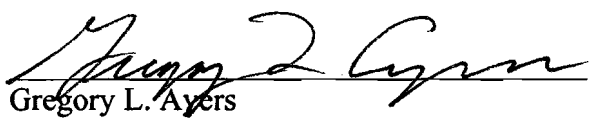

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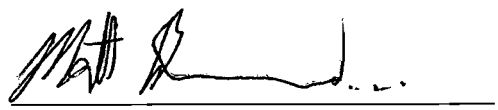
CERTIFICATE OF SERVICE

I, Matthew D. Brummond, hereby certify that on the 13th day of May, 2009, I delivered via U.S. Postal Service a copy of the foregoing Appellant's Brief to Dawn Warfield, Deputy Attorney General, Attorney General's Office, 1900 Kanawha Boulevard East, Room E-26, Charleston, WV 25305.



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