

NO. \_\_\_\_\_

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

\_\_\_\_\_  
SEPTEMBER, 2009 TERM  
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IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff,

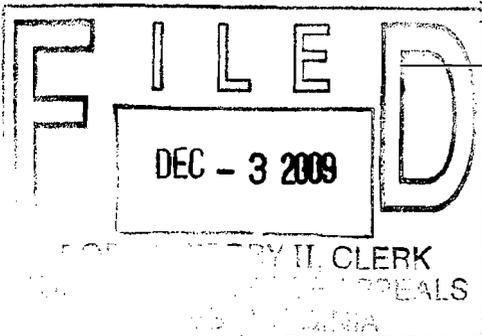
v.

CASE NO. 08-F-192-1  
Judge John L Marks, Jr.

KENNETH E. MCINTYRE,

Defendant.

\_\_\_\_\_  
PETITION FOR APPEAL  
\_\_\_\_\_



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IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff,

v.

CASE NO.08-F-192-1  
Judge John L Marks, Jr.

KENNETH E. MCINTYRE,

Defendant.

**JURISDICTION**

Comes now the Petitioner, Kenneth E. McIntyre, by his counsel, Nancy C. Ulrich, Chief Public Defender for Harrison County, West Virginia, pursuant to Rule 4A of the West Virginia Rules of Appellate Procedure and petitions the West Virginia Supreme Court of Appeals for relief from a final Order entered in this case on May 1, 2009, by the Circuit Court of Harrison County.

**KIND OF PROCEEDING AND NATURE OF RULINGS BELOW**

On July 12, 1993, a warrant was obtained by the Harrison County Sheriff's Department for the arrest of Kenneth E. McIntyre. He was charged with Sexual Assault in the First Degree. On February 13, 2008, a preliminary hearing was held and probable cause was found and the matter bound over to the Grand Jury. The September, 2008, term of the Harrison County Grand Jury returned a sixteen count indictment, being Felony Number 08-F-192-, charging the petitioner with four counts of Sexual Abuse in the First Degree; four counts of Sexual Assault in the First Degree; four counts of Sexual Abuse by a Parent, and four counts of incest. Accordingly, the petitioner was arraigned upon the felony indictment on September 10, 2008. On December 9, 2008, a jury trial was

held in this matter, and the jury returned a verdict of guilty as to the offenses of four counts of sexual assault in the first degree, four counts of sexual abuse by a parent, and four counts of incest. The Court granted defendant's motion for judgment of acquittal on Counts One, Five, Nine and Thirteen of the Indictment, being Sexual Abuse in the First Degree. A presentence investigation was ordered by the Court and post-trial motions and sentencing scheduled for May 1, 2009.

At the hearing of April 27, 2009, the petitioner's pretrial motions were denied and the petitioner was sentenced to serve the following in a West Virginia penitentiary:

1. Count Two, Sexual Assault in First Degree - Term:15-35 years
2. Count Three, Sexual Abuse by Parent, Term: 5-15 years
3. Count Four, Incest, Term: 5-15 years
4. Count Six, Sexual Assault in the First Degree, Term 15-35 years
5. Count Seven, Sexual Abuse by Parent, Term: 5-15 years
6. Count Eight, Incest, Term 5-15 years
7. Count Ten, Sexual Assault in First Degree - Term:15-35 years, to run consecutively to Counts Two, Three, Four, Six, Seven and Eight;
8. Count Eleven, Sexual Abuse by Parent, Term: 5-15 years, to run consecutively to Counts Two, Three, Four, Six, Seven and Eight
9. Count Twelve, Incest, Term: 5-15 years, to run consecutively to Counts Two, Three, Four, Six, Seven and Eight
10. Count Fourteen, Sexual Assault in First Degree - Term:15-35 years, to run consecutively to Counts Two, Three, Four, Six, Seven and Eight
11. Count Fifteen, Sexual Abuse by Parent, Term: 5-15 years, to run consecutively to Counts

Two, Three, Four, Six, Seven and Eight

12. Count Sixteen, Incest, Term: 5-15 years, to run consecutively to Counts Two, Three, Four, Six, Seven and Eight

The petitioner appeals from the denial of post-trial motions and the sentencing order entered in the Harrison County Circuit Court on May 1, 2009.

### **STATEMENT OF THE FACTS**

On July 12, 1993, Deputy Steve Johnson caused to have filed a warrant and criminal complaint in the Harrison County Magistrate Court charging the defendant with the felony offense of sexual assault against his daughter, S.M., having date of birth of December 9, 1982, "while they lived in the Glen Falls section of Harrison County, in the month of April, 1992."

The warrant and complaint resulted from a disclosure made by S.M. to Tim Bowman, a counselor with Try Again Homes, in January, 1993. Following the disclosure the West Virginia Department of Health and Human Resources was contacted and an appointment made for Child Protective Service Worker, then Terri Givens, now Terri Walker, to interview, via a tape recording, of S.M. and her two infant brothers on January 22, 1993. Deputy Steven Johnson was also present for the interview. The children were brought to the interview by their mother and stepfather.

According to the statement provided by S.M., approximately four offenses were to have occurred between April 6, 1992 to April 27, 1992. There is a factual issue as to where the S.M. and her siblings were living during this time frame.

Pursuant to a divorce decree, Mary McIntyre, then wife of Kenneth McIntyre, left the

defendant and their six children on November 3, 1990. A divorce and custody of the six children was granted to the defendant at a hearing held on May 21, 1991, and entered by the Court on July 9, 1991.

On October 9, 1991, in Harrison County, the defendant was arrested for second offense DUI and posted bond. On March 15, 1992, the defendant was arrested and incarcerated upon a capias for failing to appear for a hearing scheduled for February 5, 1992. The defendant was released from jail on April 3, 1992, having posted bond. On June 6, 1992, the defendant was committed to the Harrison County Correctional Center to serve a sentence of six months and one day following a conviction for second offense driving under the influence. He was released from incarceration on September 4, 1992.

Following his release from jail on April 3, 1992, the defendant dropped off his six children, including S.M., at the home of his sister, Linda Garrett, and never returned to collect them. The children were cared for by Ms. Garrett and another sister, Judy Crites, who eventually contacted and requested that the West Virginia Department of Health and Human Resources (hereinafter "DHHR") to locate the children's mother. The aunts remember the children living in their homes for weeks prior to and for Easter of 1992. All parties agreed that Easter of that year was April 19<sup>th</sup>. S.M.'s stepfather remembers that he had S.M. and her five siblings on Easter Sunday of 1992 because he cooked the dinner. There is no dispute that once the defendant dropped the children off at Ms. Garrett's home, he never saw S.M. again until the preliminary hearing held in this matter on February 13, 2008.

On or about December 19, 2007, the defendant was stopped while driving in Tennessee. He did not have a valid driver's licenses. Upon questioning by a state trooper the defendant gave

his name as William McIntyre, his deceased brother. The defendant was arrested and served three months in a county jail in Kingsport, Tennessee. The outstanding warrant and capias issued in West Virginia for the instant offenses were realized in Tennessee and, after completing his sentence in Tennessee, the defendant waived his rights and agreed to be extradited back to West Virginia to face the charges. A grand jury sitting in the May, 2008, term returned a sixteen count indictment against the defendant.

### **ASSIGNMENT OF ERROR**

1. The Court erred in failing to grant a judgment of acquittal pursuant to West Virginia Rule of Criminal Procedure 29(c) as the defendant presented an alibi defense to the allegations contained within the indictment herein.

2. The Court erred in changing his ruling to allow the introduction of Rule 404(b) evidence which unfairly prejudiced the defendant and denying him a fair trial.

3. The State of West Virginia attempted to improperly impeach the defendant's credibility in violation of Rules of Evidence 402, 403, 404(b), 608 and 609, to the unfair prejudice of the defendant, denying him his due process right to a fair trial.

4. Throughout the trial of this matter, the State of West Virginia engaged in subterfuge to get before the jury evidence not otherwise admissible by attempting to admit evidence of bad acts to imply bad character of the defendant in violation of Rules 401, 402, 403, 404(b), 608 and 609 of the West Virginia Rules of Evidence.

5. The Court erred in failing to direct a verdict as the alleged victim's testimony was inherently incredible and/or incompetent to support the allegations.

6. The Rape Shield law prejudiced the defendant in receiving a fair trial.

7. As a matter of plain error the Court should reverse the judgment in this matter.

### STATEMENT OF THE LAW AND ARGUMENT

1. The Court erred in failing to grant a judgment of acquittal pursuant to West Virginia Rule of Criminal Procedure 29(c) as the defendant presented an alibi defense to the allegations contained within the indictment herein.

The dates of the alleged offenses as contained within the indictment herein were to have occurred between the “ \_\_\_ day of December, 1991 through the \_\_\_ day of December, 1992. However, all of the evidence provided in discovery and all of the evidence presented at trial was that these offenses were to have occurred in April, 1992. The criminal complaint states that these alleged offenses were to have occurred in “April, 1992”. The warrant for arrest for arrest states that the offenses were committed on the “ \_\_\_ day of April, 1992”. The investigating officer’s report states that the offenses occurred from April 6, 1992 to April 27, 1992. The grand jury transcript contains the sworn testimony of the investigating officer, Deputy Steve Johnson, who testifies that these alleged offenses were to have occurred in April, 1992. In its opening statement to the jury the State tells the jury that these offenses are alleged to have occurred over a few weeks during the Spring of ‘92.(pp. 19, 23, Trial Transcript). The child protective service, case worker who initially interviewed the alleged victim and followed the family, testified that she believed that the alleged offenses were to have occurred in April, 1992. (p. 56, Trial Transcript). The investigating officer testified in the trial of this matter that he placed in his complaint that these alleged offenses were to have occurred in April of 1992. (p. 67, 70 Trial Transcript) and that he had further narrowed the dates of the alleged offenses to have occurred from April 6, 1992 to April 27, 1992. (p.75, Trial Transcript). The State asked of the alleged

victim how old she would have been in Spring of 1992, implying that the alleged offenses were to have occurred at that time (p.3, Trial Transcript).

It is agreed to, undisputed and documented, with exhibits placed in evidence, that the defendant was in the Harrison County Correctional Center from March 15, 1992 until April 3, 1992. It is also agreed to and undisputed that Kenneth McIntyre dropped all six of his children off at the home of his sister, Linda Garrett, shortly after his release from incarceration. It is also agreed to and undisputed that from the time the defendant dropped his children off at the home of his sister, following his release from the said Correctional Center, he never saw any of the children again until February, 2008. All six children were subsequently cared for by two aunts, Linda Garrett and Judy Crites, until being returned to live with their mother on Easter or very close to Easter which in 1992 fell on April 19th. Witness Linda Garrett testified that she kept the children for a period of a few weeks and that they had been dropped off at her home around the first of April. She tied this to events occurring because of the Easter holiday and having to get clothing, diapers, etc. for six children.(pp119, 120, Trial Transcript). Witness Judy Crites testified that the kids were dropped off to her sister a couple of days after the defendant got out of jail and she helped her sister care for the children.(p. 161, Trial Transcript). This witness' recollection is again centered around activities of the Easter holiday. Kenneth McIntyre testified that he dropped all six of his children off at his sister, Linda Garrett's home, the day of or the following day after his release from incarceration, being April 3, 1992. Another witness, Misti Garrett testified that the children were at her mother's home, being Linda Garrett, when she came home from school one day; the children stayed for a week or two then went to her Aunt Judy's home and then were reunited with their mother around Easter.(pp.182, 183, Trial Transcript).

If, in fact, there exists a day or two that is unaccounted for in the alibi defense, that is countered by the testimony of the alleged victim. According to the alleged victim's testimony, five separate offenses were to have occurred. These offenses did not happen every night nor even every other night with implications that the defendant was too drunk to physically engage in sexual intercourse (pp. 17-20, Partial Trial Transcript).

The defendant presented an alibi defense and this matter should have been dismissed pursuant to Rule 29, of the West Virginia Rules of Criminal Procedure.

2. The Court erred in changing his ruling to allow the introduction of Rule 404(b) evidence which unfairly prejudiced the defendant and denying him a fair trial.

West Virginia Trial Court Rule 32.02(b) provides as "mandatory discovery" that: "In all criminal cases, the attorney for the State shall advise the defendant of its intention to introduce evidence in its case-in-chief at trial pursuant to W. Va. R. Evid 404(b)." Rule 404(b) provides that: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial. The defendant filed a pretrial motion requesting notice of any 404(b) evidence that the State intended to use in trial. The State responded to the defense motion by contending that: "The State intends to introduce evidence that the defendant was arrested in the State of Tennessee, under the alias of William Lee McIntyre, in or about the

month of December, 2007, which led to his extradition to the State of West Virginia in this matter. The State's purpose for offering said evidence is for identification purposes and to verify the defendant's location as of 2007." The Court's initial ruling (pp. 12, 13, Trial Transcript, December 9-11, 2008) was that the State could present evidence that the defendant was found in Tennessee and he was extradited back to West Virginia to answer these charges. The defense could present that the defendant voluntarily came back to West Virginia and waived extradition to face the charges. The Court permitted the redaction of "aka William Lee McIntyre" from the style of this action.

However, the State, during the trial and beyond the scope of direct examination, asked the second defense witness called to testify (who testified prior to the defendant testifying) whether or not she had a brother, named William McIntyre. The defense renewed the earlier objection moving to exclude this evidence based upon the Court's prior ruling to exclude this evidence. The Court, following additional argument, overruled the defendant's objection based upon the contentions of the State that the purpose of asking the question was to determine why the witness had not had any contact with the defendant over the last sixteen years. The State could have simply asked if she knew why the defendant failed to contact her. There was no notice given to the defendant that the State intended to inquire into this matter either by a written response or any arguments presented earlier to the Court.

After the Court's ruling the State continued this line of questioning and went on to broaden its inquiry to ask if the witness knew if the defendant used the name of her brother, William, and if she knew if any family member complained to the Sheriff's Department about his use of the name. Again there was no notice of this evidence given in response to the

defendant's motion and it went beyond the State's representation to the Court.(pp.131-134, Trial Transcript). This evidence was irrelevant, hearsay, collateral and inflammatory for which no exception(s), exists to allow for its admission and totally unrelated to the offense for which the defendant was charged. Rules of Evidence 801, 802, 803; Rules of Evidence, 401 and 402; and Rule of Evidence 403 and 404(b).

The effect of this questioning was to infer to the jury that the defendant had something to hide, that being his identity, because he knew that he had committed these offenses and had purposely remained out of the State of West Virginia attempting to escape apprehension. When, in fact, the defendant didn't want to be arrested on the driving charges. He had previously been arrested in Tennessee on misdemeanor driving offenses and never advised of any outstanding warrant in West Virginia. The defendant had no knowledge of nor fear of being arrested on an outstanding warrant from West Virginia.

This evidence unfairly prejudiced the defendant denying him a fair trial

3.The State of West Virginia attempted to improperly impeach the defendant's credibility in violation of Rules of Evidence 402, 403, 404(b), 608 and 609, to the unfair prejudice of the defendant, denying him his due process right to a fair trial.

In response to a direct examination question as to how he found out about the outstanding capias in West Virginia for his arrest for the instant offense, the defendant testified that on his way back to West Virginia he was stopped by a Tennessee State Trooper. He did not have a valid driver's licenses and gave the name of his deceased brother, William. The trooper found out that the driver of the vehicle was actually the defendant and then found the outstanding capias in West Virginia (pp.62,62, Partial Trial Transcript). On cross examination the State of West

Virginia introduced evidence, in attempting to impeach the defendant, by stating that it “believed” that the defendant had been previously stopped in Tennessee, around March, 2007, for a traffic violation, a stop prior to the stop that ended up in the defendant’s extradition to West Virginia, and that there were additional outstanding *capias* in the State of Tennessee for the defendant’s arrest. The defendant objected. When asked by the Court for the State to produce that documentation, the State responded that it did not have that information as part of his file at that time and ask leave of the Court to be able to provide that documentation following the recess of the jury for lunch. That was granted.(pp 91, 92, 93, Partial Transcript).

That the State would be attempting to elicit the commission of other crimes was never provided to the defendant in response to the defendant’s pretrial motion to disclose 404(b) evidence.

Following the lunch recess the trial resumed with the defendant continuing to testify on cross examination. This time the State of West Virginia attempted to push further into the defendant’s arrest in Tennessee by asking about using the name of William McIntyre and his social security number. The defendant objected and asked for a mistrial. The Court sustained the defendant’s objection and gave a cautionary instruction to the jury.(pp. 101,102, Partial Trial Transcript).

“In a criminal trial, the state cannot introduce evidence, not connected with the crime for which the accused is being tried, for the purpose of showing his bad character, until the accused has first put his own character in issue by attempting to prove good character.” Syllabus point 5, *State v. McArdle*, 156 W. Va. 409, 194 S.E.2d 174 (1073).

In the absence of an effort by a defendant to prove good character, evidence of the

commission of other crimes is not admissible. *State v. Miller*, 75 W. Va. 591, 84 S.E. 383. The defendant never placed his character into evidence.

The admission of impeachment testimony pursuant to Rule of Evidence 608(a) is within the sound discretion of the trial judge and is subject to Rule of Evidence 402, which requires the evidence to be relevant; Rule of Evidence 403 which requires the exclusion of evidence whose probative value is substantially outweighed by the danger of unfair prejudice; and Rule 611 which requires the Court to protect witnesses from harassment and undue embarrassment.

*State v. Wood*, 194 W. Va. 525, 460 S.E.2d 771 (1995). Additionally, Rule 608(a) requires that evidence of character can only be attacked by evidence in the form of opinion or reputation. Rule 608(b) provides that specific acts of conduct may not be used to attack character and cannot be inquired into even on cross examination of the accused. Rule of evidence 609(a) further provides that "For the purpose of attacking the credibility of a witness accused in a criminal case, evidence that the accused has been convicted of a crime shall be admitted only if the crime involved perjury or false swearing.

The State of West Virginia attempted to impeach the defendant's credibility in violation of Rules of Evidence 402, 403, 404(b), 608 and 609, to the unfair prejudice of the defendant, denying him a fair trial. The jury can only conclude from this evidence that the defendant had an extensive criminal history and, therefore, is a bad person and that he had something to hide and was avoiding detection by law enforcement by assuming his brother's name. The defendant's due process right to a fair trial was denied him.

4. Throughout the trial of this matter, the State of West Virginia engaged in subterfuge to get before the jury evidence not otherwise admissible by attempting to admit evidence of bad acts

to imply bad character of the defendant in violation of Rules 401, 402, 403, 404(b), 608 and 609 of the West Virginia Rules of Evidence.

Not only did the State of West Virginia attempt to improperly impeach the defendant by attempting to admit evidence of misdemeanor crimes but continued to engaged in further subterfuge to the prejudice of the defendant by attempting to attack his character through bad acts without a shred of evidence to support the attack. Trial testimony was that Ms. McIntyre left the family in November, 1990. A divorce decree says November 3, 1990. The second witness testifying for the defense and having testified prior to the testimony of the defendant, was asked by the State on cross examination if she had a brother named William and if she knew whether the defendant used that name and if she or any family member had ever complained to the Sheriff's Department about the defendant using that name. The State continued its inquiry as to the witness' knowledge of the whereabouts of Mary McIntyre, former wife of the defendant, after she had deserted the family, implying that she been living at Hope, Inc., at a home for battered women in Marion County, West Virginia, having been battered by the defendant (pp.133,134, 135, Trial Transcript).

With another defense witness the State asked if the witness knew where Mary McIntyre had been since leaving the family home.(p. 169, Trial Transcript). The State inquired on cross examination of a third defense witness if she knew where Mary McIntyre resided when she left the defendant, implying a battered women's shelter and if the witness knew who battered Ms. McIntyre. The defendant objected. The State argued that it was only inquiring as to this evidence because of the defense "has constantly said Mary left the family and left the kids. And this will fill out the picture that she didn't leave of her own choice, that she was forced to go to

the battered women's shelter". (p.191, Trial Transcript). This contention of the State is ludicrous as the State initially asked defense witnesses the whereabouts of Mary McIntyre before any intervention by the defense. The Court sustained the defense objection and gave the jury a cautionary instruction.(p.191, 192, Trial Transcript).

Through a "rebuttal witness" the State of West Virginia again attempted to admit extrinsic and collateral evidence of an alleged battery of Ms. McIntyre, implying this occurred at the hand of the defendant, in an attempt to improperly attack the character of the defendant. The "rebuttal witness" who later became Ms. McIntyre's husband, says that he met Ms. McIntyre in April, 1991, and her teeth were knocked out and she had black eyes at that time.(p.205, Trial Transcript). This was some five months after she had left the home. Although not transcribed, the defendant by counsel objected and again asked for a mistrial. The Court sustained the objection. (pp. 205, 206, 207, 208, Trial Transcript).

The State continues with the same witness attempting to inflame the jury against the defendant by attempting to admit irrelevant and inadmissible collateral and extrinsic evidence. This time the State attempts to have the witness testify that when the children were brought to his home they were dirty, undernourished, etc., all irrelevant and another attempt to portray the defendant as being a bad person. There was a defense objection and a court ruling limiting the State's questioning (pp 211, 212, Trial Transcript). The State continues in the same vein, attacking the defendant's character in violation of the Court's ruling and Rules of Evidence 401, 403, 404(b), 607 and 608 of the West Virginia Rules of Criminal Procedure, by having the same witness testify that the bag of clothing received for the children smelled strongly of urine, etc. This line of questioning brought an immediate objection by the Court with a cautionary

instruction given to the jury (pp. 212, 213, Trial Transcript).

This “rebuttal witness” of the State of West Virginia was not truly a rebuttal witness but a witness who was used in rebuttal in an attempt to admit evidence that the State did not want to disclose to the defendant pursuant to West Virginia Trial Court Rule 32.02(b) and Rule of Evidence 404(b). If this evidence was presented in its case-in-chief, the State would have to disclose the evidence. The State prepared a surprise attack in an attempt to portray the defendant as a bad person. This evidence was highly inflammatory and irrelevant and improper impeaching of a defendant. Again the defendant never placed his character into evidence.

Following the repeated attempts by the State to place this improper evidence before the jury, the jury could only conclude that the defendant is a bad person who does bad things. Not only does he severely beat his wife but he allows his children to be filthy dirty and underfed. Additionally, the jury can only conclude because of the repeated bench conferences and the cautionary instructions given that the defendant is trying to hide something. The defendant has been denied his due process right to a fair trial.

5. The Court erred in failing to direct a verdict as the alleged victim’s testimony was inherently incredible and/or incompetent to support the allegations.

At the time of the alleged offenses the alleged victim was approximately nine and one-half years old. She was ten years old when she gave a statement to the West Virginia Department of Health and Human Resources regarding the alleged offenses and she was twenty-six years old when testifying at the preliminary hearing and trial of this matter. In response to certain questioning, where she couldn’t recall or didn’t know the answer, upon prodding or giving a choice of several answers by the State, she would simply guess at an answer. When testifying at

trial she testified that she had lived a year at her grandpa's house following the offer by the State for her to choose from a day or over a year (p.11, Partial Transcript). Then on page 48 of the transcript the alleged victim says that she didn't live at the house very long.

When she didn't understand or didn't know the answer to the question being asked, on many occasions she just didn't respond and the question would have to be asked of her again and usually rephrased. (p.10,11,21, 23, Partial Transcript). She responded saying that she did not know or remember to many factual questions asked of her (p.19, 22, 23,24, 25, 26, 29, 30,31 35,37, 40, 47 Partial Transcript). Some of these questions were very simple such as whether or not she was in school. She didn't ever remember being in school in Harrison County. She would have been in school for at least three years in Harrison County before moving to Marion County.

Her memory/testimony was simply wrong or inconsistent, ie., (1) whether or not she ever lived at the grandparent's home. Evidence is that she never stayed or lived there;(2) The description of the house as to the number of bedrooms, locks on doors, etc., was wrong. This could possibly be attributed to the passing of time or to her youth. However, in other court proceedings she had no hesitancy in providing answers to these questions but the answers were never the same.

(3) There were inconsistencies to her testimony. When these offenses were to have occurred she screamed (p.11, Partial Transcript); she hollered but no one heard (p.22, Partial Transcript); was tied to a bed rail, with tape over her mouth and was raped (pp. 36, 41, 42, Partial Transcript). (4) Testimony differed from that provided at a preliminary hearing and during trial as to where these offenses took place and how many times they happened (p.45, Partial Transcript).

Very disturbing was the unsworn statement of the alleged victim contained in a victim's

impact statement where she contended that she had to have treatment over a long period of time for reconstructive surgery to her vagina. No information such as this was ever shared with the defense and it is completely different from the report following the medical examination performed on the alleged victim by Dr. Cheryl Sutton 1993, following the alleged offenses of April, 1992. Although not clear, it is believed that the alleged victim did not receive any medical care following the alleged offense of April, 1992. Although Dr. Sutton's report was not admitted into evidence, this most likely would have been impeachment evidence for the defendant.

All of these variances and inconsistencies in the alleged victim's testimony raises concerns of her competency in remembering where, when and confusion as to what happened to her in her infancy years. There exists a felony conviction filed in 1989 in Harrison County Circuit Court whereby an adult male was convicted of a sexual assault of this same alleged victim. Obviously this was information not given to the jury to consider in their deliberations. It appeared that the alleged victim was confusing that case with her allegations in this case.

The alleged victim's hesitancy in testifying, her needing to be led in providing testimony, the inconsistency and the numerous "I don't know or remember" responses caused her evidence to be inherently incredible and unbelievable for which the Court should have granted the defendant a judgment of acquittal.

6. The Rape Shield law prejudiced the defendant in receiving a fair trial.

West Virginia Code §61-8B-11 prevents the introduction of any evidence of any past sexual behavior of the alleged victim unless the evidence, first heard out of the presence of the judge, is found to be relevant. In the instant case, the alleged victim, in 1989, was a child victim of an adult male indicted for sexual assault in the first degree and convicted by plea agreement of

sexual abuse in the Harrison County Circuit Court. The defendant was the complainant for his daughter in that case. It is unclear whether or not the child was medically evaluated following those offenses. However, following the alleged incidents of April, 1992, the child, by the request of the mother, not the Department of Health and Human Resources, as the doctor's note indicates on the report of the evaluation, was taken to see Dr. Cheryl Sutton, a local pediatrician, for a medical evaluation. The report of the evaluation was a conclusion indicating long term vaginal penetration of this child. The diagnosis was not based upon an explanation as to how this type of evaluation is required to be performed and was performed in order to provide a diagnosis based upon medical certainty. Dr. Sutton is no longer in the area and it was learned that she is suffering from medical infirmities making her unavailable for cross examination during the trial of this matter.

The defendant's dilemma became attempting to establish through the alleged victim that this prior offense had actually occurred, whether or not she suffered injuries from those assaults, if anyone else had violated her to bring about this finding of Dr. Sutton, or presenting an expert witness to critique Dr. Sutton's report or to say that based upon Dr. Sutton's findings, her conclusion could not be supported from the offenses alleged to have occurred in April, 1992. This is all excluded by the rape shield law.

The defendant's only strategy became to move to exclude Dr. Sutton's report as the report was hearsay because Dr. Sutton was not available for cross examination. The Court, however, allowed the State to introduce that the alleged victim was seen by Dr. Sutton and that based upon that evaluation certain actions were taken.

It is not even clear at this point that DHHR referred this child to counseling or treatment

as the children were already in counseling in helping to reunite the children with their mother. The DHHR file was supposed not to contain any information regarding this child. Counseling records have been destroyed because of the passage of time. Therefore, there is no way of knowing if this child received medical treatment or counseling due to being sexually assaulted, if she recanted, if she named other individuals or if her counseling was only for the purpose of reuniting the children with their mother. Obviously, the implication that the alleged victim was evaluated by Dr. Sutton and certain actions were taken as a result of the evaluation can only imply that the alleged victim suffered some trauma caused by the defendant.

The Rape Shield Law denied the defendant his due process rights to a fair trial because it denied him the ability to fully present his case for the jury's consideration.

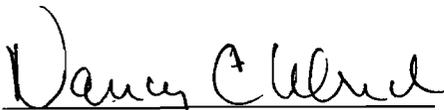
7. As a matter of plain error the Court should reverse the judgment in this matter.

“To trigger application of the “plain error” doctrine, there must be (1) an error; (2) that it is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.” Syllabus point 1, *State v. Davis*, 220 W. Va. 590, 648 S.E.2d 354 (2007). There is clearly and obviously so much error in this case that has denied the defendant a fair trial due. There is questionable competency of the alleged victim in remembering correctly due to the passage of time, suffering a known sexual assault that occurred just a few years earlier with probable confusion of alleged perpetrator; her age at the time of the accusations and the upheaval in her life due to being deserted by the mother and now the father. There was so much information unavailable to the defendant, memory lapses due to the passage of time and an old head injury, the impermissible assassination of the defendant's character by the State, improperly admitting Rule of Evidence 404(b) evidence, constant objections and

cautionary instructions given, and being prejudiced by the Rape Shield Law. This just was not a fair trial!

WHEREFORE, the defendant requests that his convictions be reversed or reversed and remanded for a new trial.

Respectfully submitted by,  
Kenneth E. McIntyre,  
By counsel,



Nancy C. Ulrich  
West Virginia Bar ID#3830  
Counsel for Defendant  
Chase Tower West, Suite 600  
215 South Third Street  
Clarksburg, WV 26301

MEMORANDUM OF APPEARANCE

FOR THE PETITIONER:

Nancy C. Ulrich, Chief Public Defender  
W.Va. State Bar #3830  
Public Defender Corporation  
15th Judicial Circuit  
Chase Tower West, Suite 600  
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Phone No. 304-627-2134  
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FOR THE STATE:

William W. Walker  
Assistant Prosecuting Attorney  
of and for Harrison County  
Harrison County Courthouse  
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Phone No. 304-624-8660  
Fax No. 304-624-8708

Office of the West Virginia Attorney General  
State Capitol, Room E-26  
Charleston, West Virginia 25305  
Phone No.: 304-558-2021

ATTORNEY VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF HARRISON, TO-WIT:

Nancy C. Ulrich, Attorney for Kenneth E. McIntyre, being first duly sworn, says that the facts alleged in said PETITION FOR APPEAL are faithfully represented and are accurately presented to the best of her ability.

Nancy C Ulrich

Nancy C. Ulrich

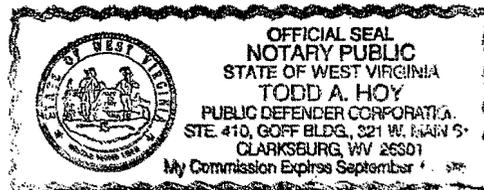
Taken, sworn and subscribed before me this 2 day of November, 2009, by Nancy C. Ulrich.

My commission expires:

September 7, 2010

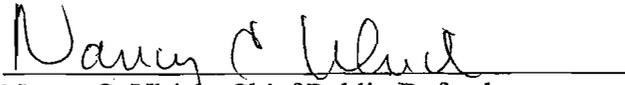
Todd Hoy

Notary Public



**CERTIFICATE OF SERVICE**

I, Nancy C. Ulrich do hereby certify that on the 2<sup>nd</sup> day of November, 2009, I caused to be delivered by hand the attached PETITION FOR APPEAL upon the Office of the Prosecuting Attorney, Harrison County Courthouse, 301 West Main Street, Room 201, Clarksburg, West Virginia and by United States Mail upon the Office of the West Virginia Attorney General, State Capitol, Room E-26, Charleston, West Virginia 25305.



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