

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

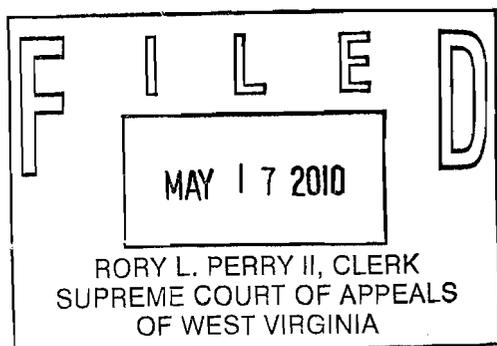
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RICHARD ALAN POORE, Appellant, v. STATE OF WEST VIRGINIA,  
Appellee

DOCKET NO: 35271

Pleasants County Circuit Court  
Case No: 06-F-7  
The Honorable Judge Robert L. Holland, Jr.

BRIEF IN REPLY TO APPELLEE'S  
BRIEF FILED ON BEHALF OF  
APPELLANT RICHARD ALAN POORE



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3. State v. McGinnis, 93 W.Va. 147, 455 S.E. 2d 516 (1994).

**REPLY TO APPELLEE'S FILED ON BEHALF OF**  
**PETITIONER RICHARD ALAN POORE**

The Appellee chooses to rely on only the Trial Record for his Statement of Fact. While technically appropriate, this not only causes a great disparity between what really happened in 1981, and what the State presented as evidence, but it underscores the fact that the passage of time has made it an impossibility for the Appellant, Richard Poore, to show what actually happened. Even without the evidence which has been lost or is unattainable due to the passage of time, the Appellant's innocence is evident in many of the records that exist including, but are not limited to, to the following: Hospital records from Selby General Hospital, Marietta Memorial Hospital and University Hospital; two police reports from Trooper Lake of St. Mary's dated 1981 and from Trooper Bauso's report dated 2006. Additionally, there are reports and notes from the long standing esteemed pathologist from West Virginia Dr. Jack Frost. There were even interviews from many witnesses called to the stand. These interviews and the other documentation of evidence draw serious questions as to how and why the State chose to prosecute this case with so much evidence against their position. Due to the passage of time and the inaction of Appellant's trial counsel, much of this evidence, the jury just never got to hear.

Here, the State ignores a voluminous amount of evidence contrary to guilt and shows that most of the testimony presented at trial was knowingly false. The Court even redacted exculpatory and impeachment evidence from the original police report which documented as many witnesses as possible. Proper procedure is to ask potential witnesses not to discuss their testimony with other witnesses. In this case, Trooper Bauso first supplied witness, Janice (the aunt), with an expert report and then asked her to contact Jeri Poore and advise them of new developments. This was prior to Trooper Bauso ever interviewing Chuckie, Jeri or Heather, who

all later testified. (Page 7 Bauso's Report) Janice is the Aunt of baby Ricky who earlier Trooper Lake referred to when he stated upon interviewing the five year old, Chucky. Trooper Lake wrote in the unredacted police report that "it became apparent that the five year old had been coached by members of the family or overheard numerous conversations detrimental to the father and no new or factual information was gained." It seems unfair of Bauso to do this knowing Trooper Lake's conclusions regarding the coaching of Chuckie. The jury never got to hear this because the Appellant was never allowed to see the unredacted Trooper Lake report or Trooper Bauso's report.

Trooper Lake further reports the dislike of Mr. Poore by the family and states "that no real or circumstantial evidence exists that the Poore's baby's illness and death was anything but natural sickness". On page two of the Appellee's brief, first paragraph, the Appellee states "At the time of the incident, Appellant was living with his wife, Jeri Williams; his four stepchildren, Heather, Laura, Allen and Chuckie and their son Ricky, Jr." This fact was testified to at court by all the family that were called as witnesses. This is factually incorrect, but the records dispute this and are impossible to find due to the "extreme delay" by the State. At the time the incident occurred the Appellant was employed by the United States Forestry Service in Ohio. After more than 25 years work records were no longer available to rebut the Prosecutor's claim that the Appellant did not work, but lived off his wife. They would have also proved that he was living and working in Ohio at the time these events took place, showing that much of what was testified to as 404(b) could never have happened. It would be hard to prove because of the loss of employment records, utility records and other records that would support this fact. Selby General Hospital has records of the birth of Ricky and the hospitalization of Ricky when he was nine (9) days old, at which time the mother reported that she and the Appellant were separated.

More documents include Trooper Lake's report, University Hospital Records and an interview given by the Mother to a local newspaper, all of which show they were separated but none of which were preserved.

The Appellee then quotes a statement given by then, five year old, Chuckie. This becomes the third documented version of this witness' statement reiterating the fact that Trooper Lake felt his testimony was "coached". Chuckie, now an adult, testifies that the Appellant kicked his two and a half year old stepdaughter 12 to 13 feet, back to the bed. However, in an interview with the local St. Mary's newspaper, Chuckie says "After eating, Laura (step-daughter) went back to sleep..." The Appellee goes on to recite much of the account given by this witness.

Janice Cornell testified about what she observed upon arriving at the home prior to the EMS. At the time, she told Trooper Lake she observed "nothing foul". See Unredacted Report of Trooper Lake. However, at trial, she paints a totally different picture for the jury, as is pointed out by the Appellee, on page 2 and 3 of the brief filed by Appellee. However, the Jury never got to hear what she originally said to Trooper Lake because it was withheld from the Appellant.

Appellee then refers to testimony given by Heather, sister of baby Ricky, who was seven years old at the time of the alleged offense. Heather testifies that she broke from her normal routine of taking baby Ricky to the babysitters when he was crying. In an interview of the babysitter conducted by David Deak and Charlie Cornell, the babysitter stated that she would babysit the children at Jeri's home. The prosecutor chose to disregard these comments and still allowed Heather to testify that she would take the baby to the home of the babysitter. These are but a few examples of the known false evidence presented which had the effect of besmirching the character of the Defendant before the jury.

Later in the Appellee's brief (see page 3), Appellee begins to discuss Dr. Kaplan's discovery of bruising on baby Ricky's ear, which Dr. Kaplan attributed to assault rather than an accidental injury. Dr. Kaplan testified at trial that the injury to the ear indicated a "pulling and squeezing type of assault" Trial Transcript. This testimony was accompanied by many questionable pictures, eight foot in size, in a tiny courtroom on an overhead projector. The issue here is Dr. Kaplan's lack of a thorough review of the record. Dr. Kaplan admits upon cross examination that he could not read Dr. Frost's notes and that he did not ask Dr. Frost to interpret the notes. Dr. Kaplan testified he did not make that request "because, quite frankly, I did not think it would be helpful." (It appears from interviews of both Dr. Frost and Dr. Kaplan to be some animosity between the two from the time Dr. Kaplan took office in 1997 until Dr. Frost's retirement in 2003.) A closer review of the Post Mortem Examination, prepared by Dr. Frost, the examining physician, shows that Dr. Frost states "a blue contusion-like area,  $\frac{3}{4}$  X  $\frac{3}{8}$ , is on the outer aspect of the pinna of the left ear; **there is no contusion on the posterior (or inner) aspect of the pinna or the adjacent scalp.**" Obviously, the bruising could not have been caused in the manner Dr. Kaplan asserts, as many of Dr. Kaplan's other postulations. This fact is of significant importance, particularly given that Dr. Frost actually observed the physical evidence.

Dr. Kaplan further asserts that there was no natural causes for baby Ricky's death. However, Dr. Kaplan attempted to illustrate how the Appellant shook baby Ricky to the point that his brain was damaged causing his cardio and respiratory functions to fail. Cardio and respiratory function failure do not repair themselves. Marietta Memorial Hospital records reflect that those functions were able to be restored on baby Ricky. Blood tests proved that there was no infection present, however, Dr. Kaplan grapples with these findings made by Dr. Myerburg

from University Hospital. The only known causes are infection, or a “gurd” event, such as choking, vomiting, etc. **The Appellant gave this exact information to EMS and doctors at the time of the alleged offense.**

The Appellee interjects a statement (see page 4) made by the mother, Jeri, that the baby’s head swelled to the point it was unrecognizable. This statement was inflammatory to the jury and was simply untrue. The autopsy photos do not show swelling as stated by the mother and by Dr. Kaplan. The autopsy photos do not show bulging of the eyes or pointing of the ears which are common signs of shaken baby syndrome.

Second, with regard to the Appellee’s 404(b) arguments, it is clear that Judge Holland said, “Character came out. No evidence of character introduced,” (Trial 403). However, the Trial Court here is clearly being disingenuous, because such evidence was replete from the very beginning -- even during Sweeney’s opening -- in which he made references to the Appellant’s “disposition” and after the prosecution specifically asked, Jeri, Heather and Chuck, during direct examination “How would you characterize the Defendant”? Trial Transcript. How can one possibly conclude that this case was not character assassination? This was not a pursuit for the truth. It was character assassination of the Appellant plain and simple.

Here it is argued by the Appellant that the State moved to have prior bad acts of domestic violence admitted under Rule 404(b) in order to show absence of mistake or accident since Appellant was asserting that baby Ricky’s injuries were unintentional and a result of attempts to resuscitate, which was outlined in the motion. But there was even clear evidence to the contrary that the Jury never got to hear. A careful review of Trooper Lake’s report shows that the “injuries” were never placed by the Appellant, but by medical staff, and claimed by them, at Marietta Memorial Hospital. Trooper Lake’s Rport Page 3, paragraph 5).

The limiting instruction given to the jury the day after hearing voluminous amounts of highly prejudicial 404(b) evidence was “on the issue of motive, intent, or absence of accident or mistake relating to the charge of murder”. This limited instruction is not specific, precise and purposeful as required for the admission of 404(b). Syl. Pt. 1 State v. McGinnis, 193 W.Va. 147, 455 S.E. 2d 516 (1994). The State did not fulfill its duty in admitting 404(b) evidence as there was never any link given on record to explain how the jury could use the 404(b) evidence other than to show that the Defendant acted in conformity therewith, as is laid out in McGinnis and the West Virginia Rules of Evidence.

It was also improper in allowing 404(b) to establish “lack of mistake or accident”, which is the position the Appellee takes in its brief. This fact was never part of the defense in this case, being an accident or mistake. It was the State’s own investigator, Trooper Lake that discovered the medical staff caused bruising, and they took full responsibility for said bruising. Yet, the Prosecution places these bruises before the jury in order to justify the admission of unsupported prior bad acts, portraying the Appellant as a “Monster”. The Court **REDACTED** evidence to disprove these very acts the State moved into evidence. Compare Trooper Lake's Redacted Report and Trooper Lakes Unredacted Report.

The State failed to show that the Appellant had any history of murder, or attempted murder, which is the charge he was indicted for. The Court allowed allegations of domestic abuse, for which there is not one shred of documented evidence to support. There are no 911 calls for domestic violence, neither testimony from a neighbor, teacher, clergy or police officer nor any independent reports to support these allegations. After the investigation was completed by Trooper Lake in 1981, he felt the five year old Chuckie had been **COACHED** and that there was no real or circumstantial evidence - only unsupported suspicions due to the family’s dislike

for the Appellant. See Trooper Lake's Unredacted Report. If these allegations were unsupported in 1981, how can the Court be “convinced to a preponderance of the evidence that the acts occurred and the defendant was the actor”, as required in McGinnis? The Appellant was not charged with domestic violence nor abuse by a guardian. He was charged with murder in the first degree. Surely, if the Appellant had uncontrollable anger - which was claimed to be the motive by Corp. Bauso - or as the Court itself stated - had a violent nature and abusive nature, or violent to everyone, as the State argued in it’s opening, there would be records of violence in his past. The State could not offer these reports because they simply never existed.

In the limited instruction by the Court on page 156 of the Trial Transcript, the Court states “You have heard testimony yesterday from...,” “You are instructed, however, you may consider that evidence..., on the issue of motive, intent or absence of mistake relating to the charge of murder.” This instruction violates the Rules of Evidence on 404(b) evidence and the ruling made in McGinnis. First, it is not “specific purpose” as required by Rules of Evidence on 404(b) evidence and the ruling made in McGinnis. Second, there was not a preponderance of the evidence presented by the State, rather the record indicates the mother’s family disliked the Appellant and coached the five year old, Chuckie, bringing into question his memory and raising the question of their credibility. Third, the State did not show prior acts of attempting to “murder”, to show motive or intent. Alleged abuse does not show motive or intent to murder.

Third, the Appellee argues that the Appellant **waived any right to assert a right afforded to everyone of you. This is simply not true. It is noted in the Trial Court's order regarding the 404(b) hearing that trial counsel did object.**

Fourth, the Appellee argues that the Appellant raises claims of a Brady violation and newly discovered evidence without establishing a record on these claims and this Court is unable

to rule on the issues. However, the first refutation of this claim is that the Appellate Record itself raises this issue. The Appellant did not have the unredacted report, which is clear from the record, and did not receive the redacted report until the Appellate Record was complete.

Furthermore, in the Appellant's Motion for New Trial dated December 5, 2008, one of the issues raised was a Brady violation, due to the exculpatory evidence the Appellant felt was probably in the unredacted police report. **(At that time the Appellant was still not provided an unredacted version).** The Appellee states "However, there is absolutely no record on the lower court ruling on these matters." This is untrue since the Court obviously denied the motion for a new trial.

The Appellee further argues, "It is somewhat unclear as to whether this evidence was ultimately withheld by the State and as to when Appellant obtained it". In this regard, the Appellant is in possession of a letter from the Supreme Court dated November 15, 2009, sending us the file, and asking the Appellant's counsel to examine the Appellate Record for completeness and respond if not complete. This would be the day that the unredacted police report was first received by Appellant and Appellant's counsel.

Fifth, Appellee claims in its brief that there was no violation due to the substantial delay. Appellee claims the delay was for legitimate reasons in that the "medical examination was never completed" when in fact the medical examination was completed, and in typed form. All that the State was waiting on was a signed report that was supposed to be mailed to Charleston.

Here, however, the State Police were aware of the death, the Medical Examiner's Office performed the autopsy, and even the Prosecuting Attorney's Office was made aware and decided on a course of action. According to Trooper Lake's report, he and the prosecutor spoke three times. In any event, the State was fully aware and had all the evidence that was possible to be

gathered within days of the autopsy. According to the facts, when applied to the law of this case, the State's failure to exercise due diligence **is not for good cause**.

There has been no new method or tests performed as the child's body has decomposed far beyond the point of being any value. There were no tissue samples preserved. This is substantial prejudice to the Appellant as this cannot be corrected which prevents the Appellant from presenting an adequate defense because no forensic analysis can be undertaken.

Dr. Frost's Post Mortem Examination, page 4, notes with regards to the brain "no other lesions are seen." Children who are victims of Shaken Baby Syndrome display lesions on the brain. Dr. Frost found none in this case. The brain damage suffered by baby Ricky was caused by "lack of oxygen" as stated by Dr. Frost many times in his report. In addition, Dr. Frost's letter to the Department of Vital Statistics states "Respiratory arrest with resultant anoxic brain damage, in association with acute bilateral subdural hemorrhage" Frost's Letter.

Additionally, the Appellee asserts that key witnesses were called. Some were called, but certainly not all that could have been available 27 years later, nor did the witnesses' who were called retain memories independent of the documentation.

Another key witness, Susan Wilson, CPS worker, could not be located by investigators. She was a SCAN Agent. She wrote a report stating "the parents were both extremely appropriate in all their responses. I felt that they were open and honest with me regarding the problems present in their family, their feelings about the child, the incident, etc... because I was contacted by the State Police in Morgantown Trooper Wable. I have told them that the child expired. I will contact Protective Services with the available information and to request that they offer supportive services." SCAN Report located in University Hospital medical records.

Linda Dunn, the Mother's best friend, would have been a crucial witness for the Appellant, but was deceased when the Appellant attempted to locate her in the instant matter. Ms. Dunn was in the home almost daily and often babysat for the children when the couple lived in New Matamoras, Ohio. Ms. Dunn spent the days after the funeral with the family. She would have had direct knowledge of the allegations made by the family of the alleged abuse and the relationship between the Appellant and Jeri Poore.

On the issue of delay, the Appellant further emphasizes that there were many witnesses that could have been called to testify and information that could have been obtained, such as employment records that were unable to be used due to the delay. Dr. Kaplan is elderly and ill, Susan Wilson cannot be located and Janice Dunn is deceased. Each witness held a different aspect of what was needed to ensure a true verdict. These witnesses would have impacted the proceedings 27 years ago. The EMS responders, the nurses and doctor at Marietta Memorial Hospital, and the transport team that transported baby Ricky to University Hospital were either unavailable or unable to correctly recollect events from 27 years ago.

The Appellee states in its brief that "the delay was for legitimate reason; namely the medical examination was never completed until 2006, and the gathering of evidence against the Appellant was not obtainable until such findings were made". As stated earlier, the examination was completed, the prosecutor knew it was complete (he actually wrote a letter), the Police knew it was complete and wrote a report stating there was no crime, and SCAN Agent wrote a report asked for support for the family. All parties involved 27 years earlier were of the belief that no crime had occurred. Everything was finished. There was no further investigation.

The State is responsible to preserve the evidence in order for the Appellant to be able to exercise his right to forensic analysis independently performed. At the time of the trial, there had

been no forensic evidence preserved. This prevented the Appellant from being able to exercise his right to an independent analysis of the forensic evidence. Since the State's Attorney argues that they could not build a case until now because the "evidence-gathering process was incomplete" and that "Dr. Kaplan conducted his analysis", it could not proceed sooner. Dr. Kaplan testified that gathering documents in this case was "like an archaeological dig in Dr. Frost's office". This calls into question the integrity of Dr. Kaplan's findings since things could have been overlooked, lost or misplaced.

Given that Dr. Frost was the only pathologist who actually examined baby Ricky, his testimony as to what he observed should have been crucial, but since he suffered a massive stroke prior to the beginning of the trial, (in fact the trial was continued several months waiting and watching his recovery, so that he could testify) according to his own statement, his memory was affected, and he was in a weakened state, so he was not as strong a witness as he would have been right after the incident occurred.

Considering the fourth factor in the speedy trial analysis established in Hinchman, *supra*, the State concedes that an unusual amount of time elapsed from the incident until Indictment and trial, but claims there was no prejudice to Appellant. It is obvious that there was substantial and actual prejudice suffered by the admittedly lengthy delay. An example of prejudice to the Appellant occurs when Chuckie Hinton testified in the State's case-in-chief, of terrible acts committed by the Appellant. However, the investigating officer interviewed Chuckie the night of the offense and felt that the statement given by Chuckie was "a misunderstanding by the young child as the father was trying to slap the baby to return it's breathing was misinterpreted by the child and that the baby showed no signs of being thrown into the floor". On page5 paragraph 5, the officer reports meeting with the then Prosecuting Attorney

Mr. Bryant and discussing this in some detail. The report continues in paragraph 7 stating “it became apparent that the five year old had been coached by members of the family or had overheard numerous conversations detrimental to the father and **no new or factual information was gained.**”

At the time the incident occurred the Appellant was employed by the United States Forestry Service in Ohio. After more than 25 years work records were no longer available to rebut the Prosecutor’s claim that the Appellant did not work, but lived off his wife. They would have also proved that he was living and working in Ohio at the time these events took place, showing that much of what was testified to as 404(b) could never have happened.

The State’s Attorney claims that the Appellant’s mother’s testimony is highly suspect given the facts of this case. Yet the State built its case on the testimony of the Appellant’s ex-wife’s family members, which according to the Investigative Report disliked Richard Poore. The testimony his family members’ could have provided was not prejudiced in nature, but rather father. For example, Leonard Poore, grandfather could have testified to the fact that Richard lived with him, and not in St. Mary’s as was testified to at trial. Richard Poore’s, father could have verified the fact that he lived and worked in Ohio. Also to the fact that Richard did not have a car, and that he depended on others to pick him up, be driven somewhere, or borrow a car from a family member. This greatly influenced his ability to come and go without someone else’s knowledge. So again this testimony could have been used as rebuttal for much of what was claimed at trial.

It is a valid argument that such combined testimony would have carried much weight with a fair and unbiased jury, undoubtedly affecting the outcome of the Trial. The passage of time affected not only the weight of the testimony but the Appellant’s ability to present his

defense in an effective manner, and undoubtedly affecting the outcome of this trial. So the fourth prong has been met.

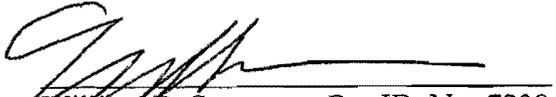
### **CONCLUSIONS AND RELIEF SOUGHT**

The best conclusion that can be drawn here is the conclusion that was drawn by the investigating officer in 1981. Richard Alan Poore, your Appellant herein, did not kill his child. As the officer stated ". . . [N]o real evidence or any circumstantial evidence exists that the Poore baby's illness and death was anything but natural sickness. . . . It is believed if the Father had caused any of the child's illness or death it was not done with intent or deliberate but that of ignorance of the proper manner to supply medical or first aid attention."

The undersigned counsel, on behalf of the Appellant, implores the Supreme Court of Appeals to reverse this case. Counsel has attempted to replay to the major areas of concern in the Appellee's Brief and would welcome the opportunity for oral arguments on these and any other issues that the Court, after its review of the record, deems important or necessary. This case was a travesty of justice, and the Court should hear this matter and, thereafter, reverse the previous judgment of guilty and the sentencing Order of the Pleasants County Circuit Court entered on January 13, 2009, and, at the very least remand the matter for trial, if not reverse the decision altogether and order that the Appellant, Richard Alan Poore, be released.

RICHARD ALAN POORE

By Counsel



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**CERTIFICATE OF SERVICE**

I, William B. Summers, do hereby certify that on May 17, 2010, I served a true copy of the hereto annexed **BRIEF IN REPLY TO APPELLEE'S BRIEF** to all parties of record in the above referenced matter by United States Mail, first class, postage prepaid, at the following address:

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