NO. 35464

IN THE

SUPREME COURT OF APPEALS

OF

WEST VIRGINIA

CHARLESTON

FILED
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Respondent,

vs.

JAMES ROBERT HARRIS,

Petitioner

APPELLANT'S BRIEF IN SUPPORT

OF PETITION FOR APPEAL

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TO: THE HONORABLES, THE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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FIRST ERROR

The trial Court made numerous rulings to exclude relevant evidence under what the court referred to as "Rape Shield Act". This is nomenclature for §61-8B-11. Sexual Offenses. Evidence. As the trial court judge explained to the jury, "the word rape", does not appear in West Virginia law. In West Virginia, the law refers to sexual offenses as either Sexual Assault or Sexual Abuse. The trial Court Judge largely based his decision regarding admissibility under the case of ***State of West Virginia v. James Quinn (490, S.E. 2d. 42 W.Va. (1997)).*** In that case, the defendant James Quinn appealed his conviction for sexual misconduct toward a child by a custodian in the Circuit Court of Wetzel County, West Virginia, on the grounds that the trial court judge ruled that our rape shield law prohibited admission of evidence that the child victim had made other statements about sexual misconduct against other persons. This court affirmed the conviction on the grounds that"... the defendant did not show that the child's other statements were false, and the evidence regarding the statements were not admissible pursuant to our rape shield law.

This case is very similar to the case of *Donald* ***R. Barbe, Petitioner – Appellant v. Thomas McBride, Warden, Mount Olive Complex, Respondent-Appellees (521, F. 3d 444 4th. Cir. 04/07/2008).*** Mr. Barbe was convicted in this very court, by the same trial judge, represented by the same defense counsel, Michael C. Alberty, Esq., for several sexual offenses. During the Donald Barbe original trial, defense counsel attempted to introduce evidence that no such assault had taken place. The trial court refused to allow the evidence to be admitted and precluded the defense from examining the state's witnesses.

Defendant Donald Barbe was unsuccessful in his appeal to this Honorable Court, Habeaus Corpors actions in the Ohio County Circuit Court and the U. S. District Court for the Northern District of West Virginia. On appeal to the U. S. Fourth Circuit Court of Appeals one of Defendant Barbe's convictions was reversed.

The U. S. Fourth Circuit Court of Appeals said as follows:

> **"...His Sixth Amendment confrontation right was undisputedly contravened, however, by the state circuit court's application of a per se rule restricting cross-examination of the prosecutor's expert under the state rape shield law – a ruling in conflict with what we term "Rock-Lucas Principle" established by the U. S. Supreme Court. See *Michigan v. Lucas (500 U.S. 145, 151 (1991)* (recognizing that, rather than adopting a per se rule for precluding evidence under rape shield statute, state courts must determine, on a case-by-case basis, whether exclusionary rule "is arbitrary or disproportionate to the State's legitimate interests" (quoting *Rock v. Arkansas (483 U. S. 44, 56 (1987*). Because the circuit court's Sixth Amendment error had a substantial and injurious effect on the jury's verdict as to the offenses involving J.M., we are constrained to deem him entitled to some habeas corpus relief ..."**
>
> **"... For the reasons that follow, we conclude that the State Court Decision involves an objectively unreasonable application of federal law, in that the state circuit court either "correctly identified the governing legal rule" –i.e., the Rock-Lucas Principle – "but applied it unreasonably to the facts", or was "unreasonable in refusing to extend the governing legal principal to a context in which it should have controlled." Conway, 453 F. 3d at 581 (internal quote marks omitted). Because of the sparse and cryptic nature of the circuit court's explanation for its denial of habeas corpus relief, we are uncertain if the circuit court failed to assess whether the rape shield law was arbitrary or disproportionate to the State's legitimate interests in the circumstances of the Barbe case, or if it made the relevant assessment and decided against Barbe. Indeed, the court failed to identify or discuss a single state or federal legal authority (including Rock or Lucas) with particular respect to Barbe's contention that the rape shield ruling contravened his sixth Amendment confrontation right. In any event, either of these alternative bases for the State**

Court Decision amounts to objectively unreasonable application of federal law.

"...We now reiterate that the Rock-Lucas Principle constitutes clearly establish federal law determined by the Supreme Court of the United States. The Rock-Lucas Principle clearly mandates that a state court , in ruling on admissibility of evidence under a rape shield law, must eschew the application of any per se rule in favor of a case by case assessment of whether the relevant exclusionary rule "is arbitrary or disproportionate to the state's legitimate interests." Lucas, 500 U.S. at 151 (quoting Rock, 483 U. S. at56)"

"...In making the Rape Shield Ruling at trial, the state circuit court contravened the Rock-Lucas Principal. That is. The circuit court applied a per se exclusionary rule, premised on its conclusion that, because Barbe was not relying on the falsity exception to the rape shield law recognized in State v. Quinn, "the rape shield law applies, period."...As the Supreme Court explained in Lucas, a court's adoption and application of a per se exclusionary rule – absent consideration of the specific facts of the case, and absent inappropriate assessment of the legitimate competing interests of the accused and the state – constitutes error."

"...We premise our conclusion on several relevant factors that a court should consider in conduction a Rock-Lucas assessment: (1) the strength of the vel non of the state's interests that weigh against admission of the excluded evidence, see *Chamber v. Mississippi, (410 U. S. 284, 295, (1973); (2)* the importance of the excluded evidence to the presentation of an effective defense, see *Davis v. Alaska (415 U.S. 308, 319 (1974);* and (3) the scope of the evidence ban being applied against the accused, see *Delaware v. Van Arsdall (475 U. S. 673. 678-679 (1986).* These factors derived from controlling Supreme Court precedent, were aggregated for the purposes of the Rock-Lucas Principle in the First Circuit's White decision. See *White (399 F. 3d at 24).*

It is irrefutable that the trial court judge in the case at bar did the exact same thing it did in the Barbe case. The trial court judge did not consider any of the relevant factors in conducting the Rock-Lucas assessment. The trial court did not (1) consider the strength vel non of the state's interests that weigh against admission of the excluded evidence, (2) consider the importance of

the excluded evidence to the presentation of an effective defense nor did he (3) consider the scope of the effective ban applied against the accused. Therefore, the trial court abused his discretion to the detriment of Defendant James Robert Harris denying him his constitution rights to due process and a fair trial. Therefore, the same trial court judge mishandled the same rape shield act over the same objections of the same defense counsel. What occurred at the case at bar is almost identical to what occurred in the Barbe case. Therefore, the conviction of James Robert Harris must be reversed.

SECOND ERROR

The trial court erred when it ordered that, "... the Defendant shall serve the aggregate sentence of not less than thirty-one (31) years nor more than eighty (80) years AFTER the Defendant serves the life sentence..."

The Court has no authority or discretion to modify or amend §61-11-18. As an act of the West Virginia Legislature, the Court must enforce and abide by the statute with strict adherence to the statutory language. The State of West Virginia through the Prosecutor has the discretion as to whether to proceed with a Habitual Criminal Proceeding under §61-11-18 of the West Virginia Code. However, once the State has chosen to proceed, the Court's sentence is no longer discretionary. The sentence is life, but, the defendant is eligible for parole in fifteen (15) years. The State and / or the Court cannot use the Habitual Criminal Statute as an enhancement to a sentencing scheme. The State would be well advised to watch what it asks for because, in this case, the State might get it. As a result of prosecuting the defendant under the West Virginia Habitual Criminal Statute, the Defendant must be eligible for parole in fifteen (15) years and regardless of the number of years stacked upon him, he will be eligible for parole after fifteen (15) years.

The trial court seeks to abrogate the intent of the West Virginia legislature. Regardless of the additional sentences, which the trial court has ordered to be served, "AFTER the defendant serves the life sentence, the trial court seeks to erase the eligibility of Defendant James Harris for parole after fifteen (15) years.

The trial court has developed a sentencing scheme that, in fact, sentences Defendant James Harris to life in prison without any possibility of parole. §62-12-13 of the West Virginia Code states the following:

> **"(b) any inmate of the state penitentiary is eligible for parole if he or she..."**
>
> **"(c) ... provided, no person sentenced to life who has been previously twice convicted of a felony be paroled until he or she has served fifteen (15) years..."**

The trial Court has attempted to abrogate the intent of the West Virginia legislature, whose intent was clearly stated that all persons sentenced to the penitentiary are eligible for parole under certain criteria. The parole board is clearly authorized by law to release a person convicted of First Degree Murder and sentenced to life imprisonment in only ten (10) years. Further, the parole board may release the person from the rest of his or her sentence after successfully being on parole for only five (5) years.

Had the prosecutor, in his discretion, not filed habitual criminal information and the Defendant James Harris had not been sentenced to a life recidivist sentence, he would not be eligible for parole until he served at least Thirty-Two (32) years. §61-12-13(10(A) of the West Virginia Code states as follows:

> **"(1)(A) has served the minimum term of his or her sentence.**

In the case of *State ex re. Ringer v. Boles (151 W.Va. 864, 871, 157, S. E. 2d. 554, 558, (1967)),* this Court stated as follow:

> **"...Habitual criminal proceedings provided for enhanced or additional punishment on proof of one or more convictions are wholly statutory. In such proceedings a court has no inherent or common law power or jurisdiction. Being in derogation of common law, such statutes are generally held to require a strict construction in favor of the prisoner".**

Furthermore, it appears that the West Virginia state legislature did not consider the scenario when a person is convicted of not only a third felony offense triggering the habitual offender statute but of multiple convictions of felonies at the same trial of the third triggering felony conviction. It is clear that the West Virginia legislature intended for the habitual offender to serve a life recidivist sentence in the state penitentiary with eligibility for parole in fifteen (15) years. Even a person in the category of a habitual offender, the state legislature did not intend for that person to serve life in prison without the possibility of parole.

Therefore, if the prosecutor files habitual offender information, the habitual offender must be sentenced to a life recidivist sentence in the state penitentiary and no more. The additional sentences cannot alter the black and white statutes that represent the West Virginia legislature's intent.

THIRD ERROR

The trial court through its court reporter has failed to provide Defendant James Harris with a transcript of the of the Sentencing Hearing. Out of an abundance of caution to preserve Defendant James Harris' appeal rights, Defense Counsel has prepared this Petition for Appeal without the benefit or assistance of the transcripts of the sentencing hearing. Also, Defense Counsel did not receive a second extension of time to write an appeal, even though he timely filed a motion for such an extension. This forced defense counsel to write this appeal without all of the transcripts that he originally asked for. Also defense counsel had only six (6) days to review days worth of transcripts and conduct legal research for issues found in the transcripts and then write two (2) separate appeals for Defendant James Robert Harris (appeal in this case no. 08-F-54 and in the Recidivist Case no. 08-F-149.

At the time of writing this Petition for Appeal, Defense Counsel has already filed the notice of appeal, the request for transcripts and a Motion to Extend Time For Appeal. The trial court entered the sentencing order of Defendant James Harris on January 7, 2009. The original appeal time expired on May 7, 2009. Defense Counsel filed a Motion for an extension of Sixty days in order to receive the transcripts and have time to prepare the Petition for Appeal to this Honorable Court. On or about June 3, 2009, Defense Counsel was advised by the court reporter that she was have mechanical difficulty with her equipment and that Defense Counsel should not expect to receive the transcripts in the near future. On or about the same day, Defense Counsel filed a Motion for a further time extension based on the fact that he had not received the trial transcripts. The Motion was neither granted or denied and to the best knowledge of the defense counsel, has never been addressed by the trial court.

On June 23, 2009, the court reporter mailed partial transcripts to Defense Counsel who did not pick up the package at the Post Office until July 1, 2009, because he was engaged in other matters and was not aware what the package contained. Enclosed please find a true and correct copy of the envelope from the court reporter and identified as Exhibit "C". Thus Defense Counsel has been in possession of the partial transcripts since July 1, 2009. Out of an abundance of caution to guarantee the appeal rights of Defendant James Harris, he has drafted this Petition for Appeal within only six days of being in possession of the transcript of the trial only.

Defense Counsel contends that the trial transcript along with a transcript of pre-trial Motion proceedings and Sentencing Hearing should have been received by Defense Counsel at least thirty (30) days prior to the filing deadline to allow for proper review and research in preparing the Petition to Appeal.

Defense Counsel has been forced to rely on the recollection of Defendant James Harris and himself, completely for the preparation for the Petition for Appeal in Recidivist Action case number 08-F-149. All events complained of are therefore by memory of the Defendant James Harris and the Defense Counsel alone due to the lack of the transcripts.

Defense Counsel has been forced to rush in writing of this appeal because of the late delivery of transcripts which were incomplete. To make matters worse both this appeal on case no. 08-F-54 and the same Defendant's Recidivist proceeding appeal on case no. 08-F-149 were due on the same day. Thus Defense Counsel, Michael C. Alberty, was forced to write two (2) important appeals with only six (6) days to examine the transcripts which were incomplete.

FOURTH ERROR

Defendant James Robert Harris appeals from the fact that Defendant James Robert Harris was required to stand trial on two (2) separate sets of charges stemming from two (2) separate incidents on two (2) different dates, with days between them in time, with two (2) separate victims were tried in one (1) jury trial, over vigorous objections from defense counsel and thus tainting the jury.

Defense Counsel understands the Mandatory Joinder rule, Rule 8 of the West Virginia Rules of Criminal Procedure, but argues that the joinder of the separate offenses in this case caused severe prejudice to the defendant. Under Rule 8(a)(2) the prosecutor felt compelled to join the separate offenses in separate counts of the same indictment. However, this is required when the prosecutor, "... is aware of two or more offenses committed within the same county and which are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."

In the case at bar the prosecutor argued that the sexual offenses that occurred at different dates and times and with different alleged victims were part of Defendant James Robert Harris's ongoing scheme to get girls to a motel and persuade them to have sexual intercourse. The problem with this logic is that there were no factual connections between the two incidents, other than the state's allegation that it was part of the defendant's ongoing scheme. Defense Counsel argued that the prejudicial effect on the jury could be severe. The jury could not be convinced beyond a reasonable doubt of one incident but felt that since there were two separate occasions that there must be something they missed. This is the "where there is smoke there is fire theory." The jury in this case was astute enough to separate the one incident from the other and found Defendant James Robert Harris innocent regarding the acts against one alleged victim therefore there was no common scheme. Therefore, as the finder of fact found Mr. Harris innocent regarding, one set of charges, there was no common scheme connecting the two transactions.

Therefore the state was wrong about a common scheme (since half of the alleged scheme was found by the finder of fact to not to have been criminal in nature beyond a reasonable doubt), and the court abused its discretion in not separating the separate counts of the indictment. If the jury is not the true and absolute finder of facts then the justice system as we know is turned on its ear.

POINTS AND AUTHORITIES CITED

CASES	PAGE
State of West Virginia v. James Quinn (490 S.E.2d. 42 W.Va. (1977))	**3,5**
Michigan v. Lucas (500 U.S. 145, 151 (1991))	**3,4**
Donald R. Barbe, Petitioner – Appellant v. Thomas McBride, Warden Mount Olive Complex, Respondent – Appellees (521 F. 3d. 444 4th Cir. 04/07/2008)	**3**
Rock v. Arkansas (483 U. S. 44, 56 (1987))	**3**
Davis v. Alaska (415 U. S. 308, 319 (1974)	**5**
Chambers v. Mississippi (410 U.S. 284, 295 (1973))	**5**
Delaware v. Van Arsdall (475 U.S. 673, 6790679 (1986))	**5**
§61-11-18 of the West Virginia Code	7
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(151 W.Va. 864,871,157, S. E. 2d 554,558 (1967)	

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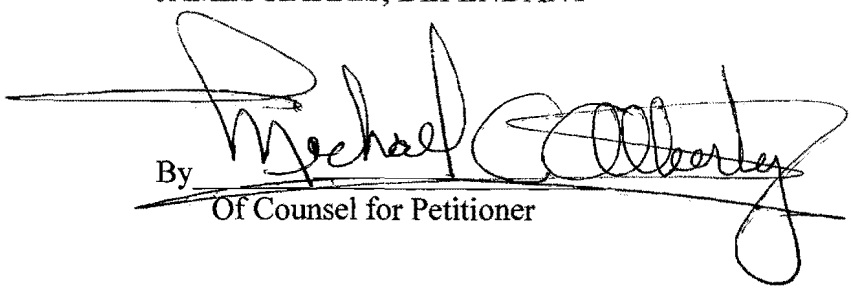
§61-11-18	7
§61-12-13	8

CONCLUSION

Based upon the errors of the trial court, the abuse of discretion of the trial court, and all of the authorities and all of the reasons set forth above and any others that are apparent to this Honorable Court set forth above, Defendant James Harris concludes that his conviction and sentence must be set aside and that this Honorable Court return the case to the trial court for a new trial and / or sentencing based upon the instructions from this Court.

Respectfully submitted,

JAMES HARRIS, DEFENDANT

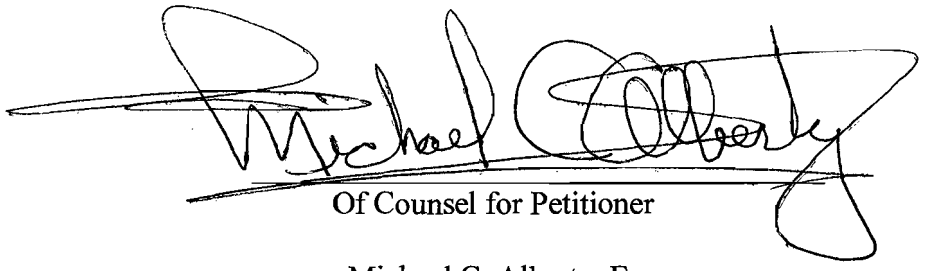


By_____
Of Counsel for Petitioner

Michael C. Alberty, Esq.
Alberty Law Office
West Virginia Bar I. D. No. 6987
63 15th. Street
Wheeling, WV 26003
Phone: (304) 232-2333
Fax: (800) 559-1565

CERTIFICATE OF SERVICE

Service of the foregoing ***APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR APPEAL*** was had upon the Respondent by depositing a true and correct copy in the U. S. Mail, First Class, Postage Pre-paid, addressed to Prosecuting Attorney of Ohio County, West Virginia, City-County Building, Second Floor, 1500 Chapline Street, Wheeling, West Virginia, 26003, this 29th day of March, 2010.



Of Counsel for Petitioner

Michael C. Alberty, Esq.
Alberty Law Office
West Virginia Bar I. D. No. 6987
63 15th. Street
Wheeling, WV 26003
Phone: (304) 232-2333
Fax: (800) 559-1565