

5-14-2013

# State v. Nichols Appellant's Reply Brief Dckt. 38123

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38123
	)	
v.	)	ELMORE COUNTY NO. CR 2009-4407
	)	
TIMOTHY NICHOLS,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ELMORE

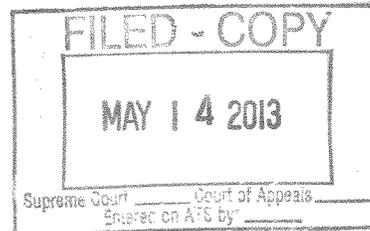
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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE CASE .....	1
Nature of the Case.....	1
Statement of the Facts and Course of Proceedings .....	2
ISSUE PRESENTED ON APPEAL.....	3
ARGUMENT .....	4
I. The District Court Erred When It Denied Mr. Nichols’ Rule 29 Motion Seeking A Judgment Of Acquittal Because The State Presented Insufficient Evidence To Establish The <i>Corpus Delicti</i> Of The Charged Offense Independent Of Mr. Nichols’ Confession .....	4
A. Introduction.....	4
B. It Would Violate Constitutional Principles Of Due Process To Apply The Elimination Of The <i>Corpus Delicti</i> Requirement From The Opinion In <i>Suriner</i> To Mr. Nichols’ Case .....	4
C. Under The Standards For <i>Corpus Delicti</i> Under Idaho Law Prior To The Elimination Of This Requirement, The State Presented Insufficient Evidence Of Corroboration Of Mr. Nichols’ Confession.....	11
CONCLUSION.....	13
CERTIFICATE OF MAILING .....	14

## TABLE OF AUTHORITIES

### Cases

<i>Bouie v. City of Columbia</i> , 378 U.S. 347 (1964) .....	5, 7
<i>Carmell v. Texas</i> , 529 U.S. 513 (2000).....	5
<i>Collins v. Youngblood</i> , 497 U.S. 37 (1990).....	5
<i>Lancaster v. Metrish</i> , 683 F.3d 740 (6th Cir. 2012) .....	7
<i>Marks v. United States</i> , 430 U.S. 188 (1977) .....	5
<i>People v. LaRosa</i> , 293 P.3d 567 (Colo. 2013) .....	7, 10, 12
<i>People v. Robson</i> , 80 P.3d 912 (Colo. App. 2003) .....	12
<i>Rogers v. Tennessee</i> , 532 U.S. 451 (2001) .....	6
<i>State v. Byers</i> , 102 Idaho 159 (1981) .....	8
<i>State v. Campbell</i> , 178 P.3d 337 (Or. Ct. App. 2008).....	12
<i>State v. Keller</i> , 8 Idaho 699 (1902) .....	9
<i>State v. Mauchley</i> , 67 P.3d 477 (Utah 2003).....	8, 10
<i>State v. Ray</i> , 926 P.2d 904 (Wash. 1996) .....	12
<i>State v. Roth</i> , 138 Idaho 820 (Ct. App. 2003).....	9, 12
<i>State v. Shackelford</i> , 150 Idaho 355, 374 n.8 (2010) .....	5
<i>State v. Tiffany</i> , 139 Idaho 909 (2004) .....	9
<i>State v. Urie</i> , 92 Idaho 71 (1968).....	9
<i>State v. Suriner</i> , 154 Idaho 81 (2013).....	10, 11, 12
<i>Thomas v. State</i> , 145 Idaho 765 (Ct. App. 2008) .....	9

## STATEMENT OF THE CASE

### Nature of the Case

In this appeal, Mr. Nichols has raised several claims on appeal, including challenges to the sufficiency of the State's evidence to establish the *corpus delicti* of the charged offense and a claim of fundamental error regarding the trial court's failure to instruct the jury regarding *corpus delicti*. Following the filing of the Respondent's Brief in this case, the Idaho Supreme Court issued an Opinion in *State v. Suriner*<sup>1</sup>, which eliminated the *corpus delicti* requirement in Idaho and left no remaining standard requiring corroboration of a confession in its wake.

This Reply Brief is necessary to clarify that retroactive application of the holding in *Suriner* that eliminated the *corpus delicti* rule to Mr. Nichols' case in this appeal would constitute a due process violation, and therefore the merits of Mr. Nichols' claims regarding *corpus delicti* must be adjudicated under the legal standards that existed prior to the elimination of this requirement. In addition, this Reply Brief is necessary to clarify that, under the pertinent legal standards, the State presented insufficient evidence to establish the *corpus delicti* of the charged offense.

While Mr. Nichols continues to assert error in the district court's admission of hearsay as to the alleged victim's age, the failure of the trial court to properly instruct the jury as to the elements of statutory rape and as to *corpus delicti*, and in the prosecutorial misconduct occurring during closing arguments, he will rely on the briefing contained within the Appellant's Brief regarding these issues, and will not reiterate his arguments herein.

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<sup>1</sup> *State v. Suriner*, 154 Idaho 81 (2013).

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Nichols's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

## ISSUE

1. Did the district court err when it denied Mr. Nichols' Rule 29 motion seeking a judgment of acquittal because the State presented insufficient evidence to establish the *corpus delicti* independent of Mr. Nichols' confession?

## ARGUMENT

### I.

#### The District Court Erred When It Denied Mr. Nichols' Rule 29 Motion Seeking A Judgment Of Acquittal Because The State Presented Insufficient Evidence To Establish The *Corpus Delicti* Of The Charged Offense Independent Of Mr. Nichols' Confession

##### A. Introduction

During the pendency of this appeal, the Idaho Supreme Court in *Suriner* held that it was eliminating the *corpus delicti* rule in Idaho and establishing no other rule requiring corroboration or trustworthiness in its place prior to the admission or use of a confession in order to sustain a finding of guilt of a charged offense. However, because this holding was both unexpected and indefensible under prior standards of law in Idaho, Mr. Nichols asserts that it would violate his constitutional right to due process for the elimination of the *corpus delicti* requirement from the State's burden of proof to be applied to his case.

Under the standards for *corpus delicti* as it existed in Idaho prior to the issuance of the *Suriner* Opinion, Mr. Nichols further asserts that the State presented insufficient evidence of corroboration at trial, and that the State's purported grounds of corroboration are likewise insufficient to meet this standard.

##### B. It Would Violate Constitutional Principles Of Due Process To Apply The Elimination Of The *Corpus Delicti* Requirement From The Opinion In *Suriner* To Mr. Nichols' Case

It is well established that the constitutional prohibition against *ex post facto* laws precludes a legislative enactment from being applied retroactively to a criminal defendant where that action, among other things, operates so as to alter the legal rules

of evidence so as to receive different or less testimony than the law required at the time of the commission of the alleged offense. See, e.g., *Carmell v. Texas*, 529 U.S. 513, 521-522 (2000); *Collins v. Youngblood*, 497 U.S. 37, 41-42 (1990). Although the *Ex Post Facto* clauses of the State and federal constitutions apply by their terms only to legislative enactments and provisions, the Fifth Amendment of the United States Constitution provides similar protections with regard to judicial actions that operate in a similar manner. *Marks v. United States*, 430 U.S. 188, 191-192 (1977). This due process protection emanates from the Fifth Amendment of the United States Constitution, and “is based on the notion that persons have the right to fair warning of that conduct which will give rise to criminal penalties.” *Id.*; see also *State v. Shackelford*, 150 Idaho 355, 374 n.8 (2010).

The United States Supreme Court made this clear in *Bouie v. City of Columbia*, 378 U.S. 347 (1964). In *Bouie*, the Court held that, “[t]here can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language.” *Bouie*, 378 U.S. at 352. The *Bouie* Court further expanded on the nature of such a due process violation when a reviewing court unexpectedly alters the common law to a defendant’s detriment:

Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids. An *ex post facto* law has been defined by this Court as one “that makes an action done before the passing of the law, and which was innocent when done, criminal; and which punishes such action” or “that aggravates a crime, or makes it greater than it was, when committed.” If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. **The fundamental**

principle that “the required criminal law must have existed when the crime occurred” must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is “unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,” it must not be given retroactive effect.

*Id.* at 353-354 (internal citations omitted) (emphasis added).

Subsequent to *Bouie*, the United States Supreme Court recognized that this due process protection extends not only to judicial interpretations of statutes, but also to judicial alterations of protections that existed only at common law. See *Rogers v. Tennessee*, 532 U.S. 451 (2001). The Court in *Rogers* held that a judicial alteration of the prior existing common law cannot be retroactively applied under the Due Process Clause of the Fifth Amendment where that alteration is “unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue.” *Id.* at 462. In making this determination, the *Rogers* Court looked to factors such as whether the common law at issue retained current justification for its on-going existence, whether it had been given meaningful effect in prior decisions (as opposed to being mentioned in passing and as dicta), whether the common law rule involved a substantive right, and whether the alteration of the reviewing court was consistent with the actions undertaken in other jurisdictions. *Id.* at 462-467.

Although the standard articulated in *Rogers* with regard to when a due process violation is established is broad in its sweep, the prior Opinion in *Bouie* – which formed the basis for the *Rogers* Opinion – provides clearer guidance. In *Bouie*, the U.S. Supreme Court clarified that, “[w]hen a state court **overrules a consistent line of procedural decisions** with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprive him of due process of law ‘in its primary sense of an

opportunity to be heard and to defend (his) substantive right.” *Bouie*, 378 U.S. at 354 (quoting *Brinkerhoff-Faris Trust and Sav. Co. v. Hill*, 281 U.S. 673, 678 (1930)) (emphasis added). In other words, where there is an established line of case law wherein a substantive right has been recognized by the courts, an abrupt departure from this consistent set of holdings cannot be retroactively applied to a criminal defendant under the Due Process Clause of the Fifth Amendment. See *Lancaster v. Metrish*, 683 F.3d 740, 744 (6th Cir. 2012).

It was this standard that led the Supreme Court of Colorado to conclude that its judicial abrogation of the *corpus delicti* requirement could not be applied retroactively under due process principles. In *People v. LaRosa*, the Supreme Court of Colorado had occasion to revisit the on-going viability of the *corpus delicti* rule in the context of a case where the only corroboration of a defendant’s confession of sexual assault was the opportunity for the defendant to have committed the offense. *People v. LaRosa*, 293 P.3d 567, 570-579 (Colo. 2013). After a discussion of the roots of the *corpus delicti* rule under the Colorado common law, the Colorado Supreme Court ultimately abandoned this rule in favor of a more general trustworthiness standard. *Id.* However, this did not end the discussion regarding the disposition of the *LaRosa* case: the Colorado Supreme Court still had to resolve whether this alteration could be applied retroactively under the Due Process Clause.

The *LaRosa* Court determined that it could not. In *LaRosa*, the Court first distinguished the abolition of the *corpus delicti* rule from the common law rule at issue in the *Rogers* Opinion. *LaRosa*, 293 P.3d at 578-579. In particular, the *LaRosa* Court noted that the common law rule at issue in *Rogers* was characterized as a “substantive

principle” of law, “‘in name only’ because it had never been enforced” in any state court decision, and “had never served as a ground of decision in any homicide prosecution in the State and had only been mentioned in three cases, each time in dicta.” *Id.* at 579 (quoting *Rogers*, 532 U.S. at 464). Although recognizing that the *corpus delicti* rule had been subject to some criticism, the Colorado Supreme Court nevertheless recognized that the rule had been in actual force in several jurisdictions, including the court’s own prior decisions. *Id.* In fact, the *LaRosa* Court noted that the *corpus delicti* rule had been the substantive law in Colorado for over one hundred years. *Id.* Accordingly, because overturning this rule was a clear, and therefore unexpected, break from well-established case law, the Court in *LaRosa* held that it would violate due process to apply the elimination of this rule to those whose convictions arose prior to its decision. As such, the Court in *LaRosa* reversed the defendant’s conviction. *Id.*

Similarly, the Supreme Court of Utah has also held that it would be unconstitutional to apply the elimination of its common law *corpus delicti* rule retroactively to those whose offenses arose prior to the court’s decision. See *State v. Mauchley*, 67 P.3d 477 (Utah 2003). Moreover, the conclusion that the elimination of the *corpus delicti* rule cannot be retroactively applied is consistent with prior decisions from the Supreme Court of Idaho in a related context.

In *State v. Byers*, the Idaho Supreme Court eliminated the common law requirement of corroboration of an alleged victim’s allegation of rape in prosecutions for this offense. *State v. Byers*, 102 Idaho 159, 160-165 (1981). However, in doing so the Court recognized that it was altering the quantum of proof required in order to establish this offense. *Id.* at 165-167. In light of this, the *Byers* Court held that the corroboration

rule must be followed with regard to the defendant in that case, along with those who were tried prior to the issuance of the Court's opinion. *Id.*

The Court in *Byers* so held because, “[t]o apply today’s decision in passing on the validity of Byers’ conviction would be the equivalent of applying an ex post facto law, and is within the prohibitions of Article I, § 10 of the United States Constitution and Art. I, § 16 of our Idaho Constitution.” *Id.* at 166. The *Byers* Court recognized that the elimination of the corroboration requirement, “alters the rules of evidence such that ‘less or different testimony than the law required at the time of the commission of the offense (is necessary) in order to convict the offender.’” *Id.* (quoting *Bouie*, 378 U.S. at 354) (alterations in the original). In light of this, the *Byers* Court held that the newly announced rule eliminating the corroboration requirement, “is to be applied prospectively to criminal trials commenced hereafter.” *Id.* at 167.

As with *Byers*, Idaho courts prior to *Suriner* had consistently recognized the *corpus delicti* rule in Idaho – dating back over one hundred years to its adoption in *State v. Keller* in 1902.<sup>2</sup> See, e.g., *State v. Tiffany*, 139 Idaho 909 (2004); *State v. Urie*, 92 Idaho 71 (1968); *State v. Keller*, 8 Idaho 699 (1902); *State v. Roth*, 138 Idaho 820 (Ct. App. 2003). And, like *LaRosa*, this rule was not one that had never had substantive force in Idaho – the requirements of *corpus delicti* were unequivocally recognized as part of the State’s burden of proof of the charged offense at trial. See, e.g., *Thomas v. State*, 145 Idaho 765, 771 (Ct. App. 2008); *Roth*, 138 Idaho at 822.

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<sup>2</sup> By appellate counsel’s count, there are approximately 70 cases in Idaho that have analyzed and applied the *corpus delicti* rule in Idaho as part of its substantive law. For sake of brevity, only a sampling of cases are cited herein.

Moreover, the elimination of the *corpus delicti* rule in Idaho under *Suriner* is particularly unexpected, given that the Idaho Supreme Court has left no standard of corroboration in its wake in order for a conviction to be sustained on the basis of a confession alone. In eliminating the *corpus delicti* rule in Idaho, the *Suriner* Court held that:

Because the harm caused by the rule exceeds whatever benefits there may be, we hold that the *corpus delicti* rule no longer applies in Idaho. **We see no reason to attempt to fashion another rule to take its place.** Instead, the jury can give a defendant's extrajudicial confession or statement whatever weight it deems appropriate along with all of the other evidence when deciding whether the State has proved guilt beyond a reasonable doubt.

*Suriner*, 154 Idaho at 88 (emphasis added).

This represents a drastic departure, not only from over a hundred years of prior established jurisprudence in Idaho, but with the general requirements for admission of or use of a confession in order to establish guilt throughout the country. "Courts adhere **almost universally** to the principle that 'an extrajudicial confession, by itself, is not sufficient to sustain a conviction for a crime.'" *Mauchley*, 67 P.3d 477, 481 (quoting *State v. Weldon*, 314 P.2d 353, 354 (1957)) (emphasis added). This nearly universal requirement of additional corroboration was further reflected in *LaRosa*, wherein the Supreme Court of Colorado recognized that, "[a]**lmost all courts** adhere to a corroboration requirement, which requires the prosecution to present corroborating evidence of a defendant's confession to either allow for its admission into evidence or sustain a conviction." *LaRosa*, 293 P.3d 567, 571 (emphasis added).

Although the modern trend has been to adopt a general trustworthiness standard with regard to the admission and use of criminal confessions, the fact remains that

some requirement of corroboration remains in nearly all jurisdictions with regard to a defendant's confessions. Accordingly, the Opinion in *Suriner* also represents a departure from the case law in nearly all jurisdictions in that there is now no standard that has supplanted *corpus delicti* in ensuring the reliability and factual corroboration of a criminal confession – or its use as the sole proof of guilt in a criminal case.

Finally, a clear indication that the elimination of *corpus delicti* in Idaho should not be retroactively applied comes from the *Suriner* Court itself. In the *Suriner* Opinion, the Idaho Supreme Court did not apply its decision to eliminate the *corpus delicti* rule to the defendant's own case – rather, the Court first analyzed whether the traditional legal standards of *corpus delicti* had been met in the defendant's case before proceeding to eliminate the rule. *Suriner*, 154 Idaho at 1095-1098. Had the rule eliminating *corpus delicti* been intended to apply retroactively, the *Suriner* Court would have applied it in Mr. Suriner's case, and would not have applied the prior rule in that case. Based upon the *Suriner* Court's implicit decision not to do so, this indicates that the elimination of the *corpus delicti* rule was not intended to operate retroactively.

C. Under The Standards For *Corpus Delicti* Under Idaho Law Prior To The Elimination Of This Requirement, The State Presented Insufficient Evidence Of Corroboration Of Mr. Nichols' Confession

Mr. Nichols asserts that, under the standards required to establish the *corpus delicti* of the charged offense, the State presented insufficient evidence to apart from Mr. Nichol's own admissions to police to establish corroboration.

The State has first asserted that the mere opportunity to commit the offense is itself corroboration. (Respondent's Brief, pp.9-10.) This assertion is in error. In order to establish the *corpus delicti* of the charged offense in Idaho, the State bears the

burden to show either the charged injury or the criminal agency – and the mere opportunity to commit the charged offense does not meet either prong. See *Roth*, 138 Idaho at 822-823; *LaRosa*, 293 P.3d at 571-579; *People v. Robson*, 80 P.3d 912, 913 (Colo. App. 2003); *State v. Campbell*, 178 P.3d 337, 340 (Or. Ct. App. 2008); *State v. Ray*, 926 P.2d 904, 907 (Wash. 1996). The reason behind this was stated succinctly by the Oregon Court of Appeals in *Campbell* – “The evidence showing that defendant had an opportunity to commit the offenses establishes only that—that he had the *opportunity*; it does not tend to establish that the offenses actually occurred.” *Campbell*, 178 P.3d at 340.

Likewise, the State’s argument that there existed additional “corroboration” due to the “equivocal circumstances” under which Mr. Nichols was found in the alleged victim’s presence is similarly misplaced. While there was testimony as to the alleged victim’s age and Mr. Nichols’ age, the only evidence as to any relationship between them in the record – or relied upon by the State in this appeal – comes directly from Mr. Nichols’ own confession to the police. (See Respondent’s Brief, pp.10-11 (citing to Tr., p.85, L.7 – p.87, L.24; p.95, L.9 – 98, L.1.) The *corpus delicti* rule requires that the corroboration come from a source **aside from the confession itself**. See *Suriner*, 154 Idaho at 83. As was set noted by the Court in *Suriner*, the *corpus delicti* rule requires that, “there must be some evidence or corroborating circumstances tending to show that a crime has been committed, **aside from such confessions or statements**.” *Id.* While multiple confessions to third parties may suffice for this rule, using the confession itself to “corroborate” the confession does not. *Id.* at 1095-1098. Otherwise, there

would be no corroboration requirement at all to the *corpus delicti* rule – mere internal consistency would suffice.

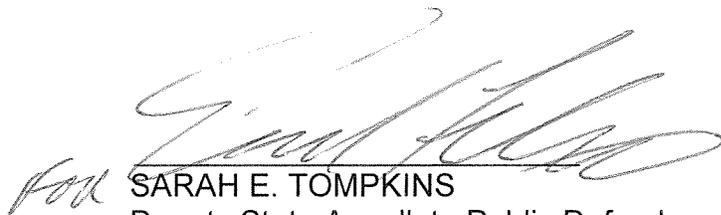
Finally, the State's reliance on the fact that the alleged victim made unidentified statements to police of entirely unknown substance cannot likewise stand as corroboration. (Respondent's Brief, p.11.) A review of the testimony at trial shows that there was literally nothing of the nature, subject matter, tenor or timing of these statements that was placed into evidence for the jury – and without any substance of these remarks at all, there can be no corroboration of either criminal agency or injury as is required to sustain proof of *corpus delicti*. (See Tr., p.70, Ls.16-23; p.110, Ls.6-18.)

The State failed to establish any proof of the *corpus delicti* of the charged offense in this case, as was their burden of proof at trial. Accordingly, Mr. Nichols asks that this Court reverse his conviction for statutory rape with prejudice.

#### CONCLUSION

Mr. Nichols respectfully requests that this Court reverse his conviction for statutory rape with prejudice, as there was insufficient evidence of the charged offense. In the alternative, Mr. Nichols respectfully requests that this Court reverse his judgment of conviction and sentence and remand this case for further proceedings.

DATED this 14<sup>th</sup> day of May, 2013.

  
For SARAH E. TOMPKINS  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 14<sup>th</sup> day of May, 2013, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

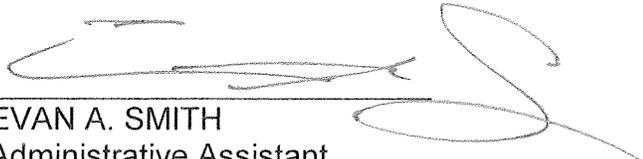
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