

TABLE OF AUTHORITIES

CASES:

Berger v. California, 393 U.S. 314 (1969)

Page 26

Bourjaily v. United States, 483 U.S. 171 (1987)

Pages 27-28

Brookhart v. Janis, 384 U.S. 1 (1966)

Page 27

Bruton v. United States, 391 U.S. 123 (1968)

Pages 27, 30

California v. Green, 399 U.S. 149 (1970)

Pages 17, 18, 27, 30

Case of Thomas Tong, Kelyng J., 17, 18, 84 Eng. Rep.1061-62 (1662)

Page 19

Cole v. White, 180 W.Va. 393, 376 S.E.2d 599 (1988)

Page 35

Coy v. Iowa, 487 U.S. 1012 (1988)

Pages 16, 29

Crawford v. Washington, 541 U.S. 36 (2004)

Pages 14, 28, 29, 30

Cruz v. New York, 481 U.S. 186 (1987)

Page 27

<u>Douglas v. Alabama</u> , 380 U.S. 415 (1965)	Page 27
<u>Dutton v. Evans</u> , 400 U.S. 74 (1970)	Page 28
<u>Eade v. Lingood</u> , 1 Atk. 203 (1747)	Page 19
<u>Farette v. California</u> , 422 U.S. 806 (1975)	Page 31
<u>Gray v. Maryland</u> , 523 U.S. 185 (1998)	Page 27
<u>Idaho v. Wright</u> , 497 U.S. 805 (1990)	Page 26
<u>Johnston v. State</u> , 10 Tenn. (2Yer.) 58 (1821)	Page 24
<u>Kirby v. United States</u> , 174 U.S. 47 (1899)	Page 26
<u>Lee v. Illinois</u> , 476 U.S. 530 (1986)	Pages 26, 30
<u>Lilly v. Virginia</u> , 527 U.S. 116	Pages 16, 26
<u>Mancusi v. Stubbs</u> , 408 U.S. 204 (1972)	Page 27
<u>Mattox v. United States</u> , 156 U.S. 237 (1895)	

	Pages 21, 24, 25
<u>Motes v. United States</u> , 178 U.S. 458 (1900)	
	Page 25, 26
<u>Ohio v. Roberts</u> , 448 U.S. 56 (1980)	
	Pages 27, 30
<u>Pointer v. Texas</u> , 380 U.S. 400 (1965)	
	Pages 27
<u>Regina v. Scaife</u> , 2 Den. C.C. 281 (1851)	
	Page 26
<u>Rex v. Paine</u> , 90 Eng. Rep. 1062 (K.B. 1696)	
	Page 19
<u>Roberts v. Russell</u> , 392 U.S. 293 (1968)	
	Page 27
<u>Salinger v. United States</u> , 272 U.S. 542 (1926)	
	Page 16
<u>State v. ex rel., Morgan v. Trent</u> , 195 W.Va. 257, 465 S.E.2d 257 (1995)	
	Pages 37
<u>State ex. rel., May v. Boles</u> , 149 W.Va. 155, 139 S.E.2d 177 (1964)	
	Pages 35
<u>State ex. rel., Riffle v. Thorn</u> , 153 W.Va. 76, 168 S.E.2d 810 (1969)	
	Pages 35
<u>State v. Browning</u> , 199 W.Va. 417, 485 S.E.2d 1 (1997)	
	Page 36

State v. Campbell, 30 S.C.L. (1Rich.) 124, 1844 WL 2558, (1844)

Page 24

State v. Cowan, 156 W.Va. 827, 197 S.E. 2d 641 (1973)

Page 38

State v. Guthrie, 194 W. Va. 657, 461 S.E.2d 163 (1995)

Pages 14, 15

State v. Guthrie, 205 W. Va. 326, 518 S.E.2d 83 (1999).

Page 15

State v. Hall, 172 W.Va. 138, 304 S.E.2d 43 (1983)

Page 14

State v. Harris, 189 W.Va. 423 S.E.2d 93 (1993)

Page 89

State v. McArdle, 156 W.Va. 409, 194 S.E.2d 174 (1973)

Pages 38

State v. Starkey, 161 W.Va. 517, 244 S.E.2d 219 (1978)

Pages 13, 15

State v. Webb, 2 N.C. (1 Hayw.) 103 (1794)

Page 24

Trial of Sir Walter Raleigh, 2 How. St. Tr. 1 (1809)

Pages 18, 29-30

United States v. Burr, 25 F. Cas. 187 (C.C. Va. 1807)(No. 14,694)

Pages 22, 23

United States v. Inadi, 475 U.S. 387

Pages 21, 28

United State v. Reid, 53 U.S. (12 How.) 361 (1851)

Page 32

White v. Illinois, 502 U.S. 346 (1992)

Pages 17, 27, 28, 31

Wilhelm v. Whyte, 161 W.Va. 67, 239 S.E.2d 735 (1977)

Pages 39

STATUTE:

West Virginia Code § 62-1B-2

Page 38

COURT RULES:

Rule 52 of the West Virginia Rules of Criminal Procedure

Page 36

Rule 103 of the West Virginia Rules of Evidence

Page 36

Rule 404 of the West Virginia Rules of Evidence

Pages 32

Rule 801 of the West Virginia Rules of Evidence

Page 36

Rule 802 of the West Virginia Rules of Evidence

Page 36, 37

Rule 803 of the West Virginia Rules of Evidence

Page 36

LEGAL TREATISES:

John Fortescue, On the Laws and Governance of England 38-40 (1997)

Page 17

1 Samuel R. Gardiner, History of England 138 (1965)

Page 18

Matthew Hale, The History of the Common Law of England 164 (Charles M. Gray ed. 1713).

Page 19

Frank R. Herrmann & Brownlow M. Speer, "Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause," 34 Va. J. Int'l L. 481, 485-92 (1994)

Page 16, 29

9 W.S. Holdsworth, History of the English Law 228 (1926)

Page 17

Randolph N. Jonakait, "The Origins of the Confrontation Clause: An Alternate History," 27 Rutgers L.J. 77, 168 (1995)

Page 31

Richard Henry Lee, Letter IV by The Federal Farmer (Oct. 15, 1787), *reprinted in* 1 Bernard Schwartz, The Bill of Rights: A Documentary History 469, 473 (1971)

Page 22

Robert P. Mosteller, "Crawford v. Washington: *Encouraging and Ensuring the Confrontation of Witnesses*," 39 U. Rich. L. Rev. 511, 607 n.548 (2005).

Page 31

Daniel H. Pollitt, "*The Right of Confrontation: Its History and Modern Dress*," 8 J. Pub. L. 381, 389-90 (1959).

Page 18

Sources of Our Liberties 284 (Richard L. Perry ed. 1959)

Page 21

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Pages 17, 18

Wigmore on Evidence §1364 (Chadbourn rev. 1977)

Page 20

Charles Allen Wright & Kenneth W. Graham, Federal Practice and Procedure: Evidence, §6342 (1997)

Page 29

Wroth & Zobel eds., Legal Papers of John Adams 207 (1965)

Page 21

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....i

PROCEEDINGS AND RULING BELOW.....3

STATEMENT OF FACTS.....12

ASSIGNMENTS OF ERROR ARGUMENTS

1) **The Trial Court erred in Denying the Appellant’s Motion for Judgment of Acquittal Because the Evidence Was Insufficient to Support a Guilty Verdict.....12**

12) **The Admission of Detective Brown’s Deposition Violated the Appellant’s Right to Counsel Free from Conflict and the Appellant’s Right to Confront Witnesses Against him.....34**

23) **The State’s Failure to Provide Psychological and Criminal Records of A.P. and J.P. Violated Article III, Section 14 of the W.Va. Constitution and Brady and its progeny.....38**

CONCLUSION.....39

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,)
)
 Appellee,)
)
 v.) Supreme Court No. 34136
)
)
 RONALD REED, SR.,)
)
 Appellant.)

APPELLANT'S BRIEF

I.

**KIND OF PROCEEDING AND NATURE OF THE RULINGS IN THE LOWER
TRIBUNAL**

On October 4, 2000, Detective Keith Brown of the Wheeling Police Department filed three criminal complaints against the Appellant alleging that the Appellant committed the offense of "Incest" against J.L.R.; alleging that the Appellant committed the offense of "Sexual Assault by a Custodian" against J.L.R.; and alleging that the Appellant committed the offense of "Sexual Assault in the First Degree" against J.L.R. (See Criminal Complaints from Magis. Ct. Case Nos. 00F-191, 192, and 193) On this day, Ohio County Magistrate Rose M. Humway issued arrest warrants for each of these charges. Then, on October 20, 2000, Lt. Bonnie Bonar of the Ohio County Sheriff's Department filed three criminal complaints against the Appellant alleging that the Appellant committed the offense of "Sexual Assault by a Custodian" against J.P.; alleging "Sexual Assault in the First Degree" against J.P. and alleging that the Appellant committed the offense of "Taking Photographs of a Sexually Explicit Conduct" against

J.P. (See Criminal Complaints from Magis. Ct. Case Nos. 00-F-205, 206, and 207) On this day, Ohio County Magistrate Worthy Paul issued arrest warrants for each of these charges.

On December 28, 2000, a preliminary hearing on these charges was held before Magistrate Worthy Paul of the Ohio County Magistrate Court (See 12-28-2000 Transcript). During this hearing, Detective Brown, Detective Bonar, and J.L.R. testified. (See 12-28-2000 Transcript at pages 5, 22 and 45) J.P. did not testify. (See 12-28-2000 Transcript at page 76) The Appellant through counsel objected to the failure of J.P. to testify. (see 12-28-2000 Transcript at page 76) At the conclusion of the hearing, Magistrate Paul found probable cause on all charges and bound the case over to the Circuit Court for further proceedings before the Grand Jury. (See 12-28-2000 Transcript at pages 81-86, 98-99)

On January 8, 2001, the Ohio County Grand Jury returned an eight count indictment against the Appellant, including one count of Sexual Assault in the First Degree as outlined in West Virginia Code § 61-8B-3(a)(2), two counts of Sexual Assault in the Second Degree in violation of West Virginia Code § 61-8B-4(a)(2), one count of Sexual Abuse by a Custodian in violation of West Virginia Code § 61-8D-5(a), two counts of Incest in violation of West Virginia Code § 61-8-12(b), and two counts of Sexual Abuse by a Parent in violation of West Virginia Code § 61-8D-5(a). (See 01-F-2 Indictment)

On February 26, 2001, a hearing was had before the Honorable Arthur M. Recht of the Ohio County Circuit Court where an issue of the Appellant's mental status was raised, and counsel for the Appellant at that time, Don A. Yannerella, moved the Court

pursuant to Rule 12.2 and West Virginia Code § 27-6A-1 for a mental examination of the Appellant. (See 2-26-2001 Transcript at pages 3-5) The Court denied this motion finding that at the time it had insufficient records to indicate a question of competency or lack of criminal responsibility. The Court also noted that in ancillary Abuse and Neglect proceedings before him, the Appellant appeared competent. (See 2-26-2001 Transcript at pages 13-14) Therefore, the Court determined that the requirements for a § 27-6A-1 evaluation had not been met and as such continued on with the hearing. (Id.) Also, prior to the hearing in writing and during the hearing orally, the Appellant through counsel requested psychological, juvenile counseling records and juvenile records of the victims and potential witnesses. (See 2-26-2001 Transcript at page 7, see also motion, Request for Psychological Medical Records, Juvenile Counseling Records, and Juvenile Records) This motion was granted in part by the Court. The Court did not release the records to the Appellant; however, the Court Ordered that they be provided for the Court's file for further review to see if the records contained any exculpatory information or any information that would show witness bias or incompetence. (See 2-26-2001 Transcript at pages 7-11) There are no records noted Index of the Record of these proceedings. The only sealed records found by counsel in the Circuit Clerk's file were regarding a hearing before Judge Recht on a *pro se* motion made by the Appellant seeking his recusal.

Then, the Court reviewed issues of 404(b) evidence noticed by the State. At this hearing J.L.R. and Jennifer Kinney testified, although the testimony of Ms. Kinney was to be continued on another date. In particular issue on this date, the State was attempting to have evidence indicating that the Appellant was the father of Michael Kinney. The State desired to use this at trial because at the time of conception of the child the mother was

fourteen years old or younger and if the Appellant had in fact been the father this child, he would have been guilty of an act that was similar in nature to those charged in the Indictment against him. (See 2-26-2001 Transcript at pages 19, 28, 97, 109-115) Also, the State desired to use testimony stating that the Appellant was seen at a local gas station touching and kissing A.P. (See 2-26-2001 Transcript at pages 73-74)

The May 2004 Term of the Ohio County Grand Jury returned a sixty-five (65) count Indictment against the Appellant. Within this Indictment, there were thirty (30) counts alleging Sexual Assault in the Third Degree in violation of W.Va. Code § 61-8B-5; thirty (30) counts alleging Sexual Abuse by a Custodian in violation of W.Va. Code § 61-8D-5(a); and five (5) misdemeanor counts of Contributing to the Delinquency of a Minor in violation of W.Va. Code § 49-7-7.

By motion dated June 10, 2004, the State moved to consolidate the 2001 and 2004 cases. See, 6-10-2004 "State's Motion to Consolidate Cases." On June 22, 2004, the Circuit Court through the Honorable Martin J. Gaughan entered an Order granting the State's Motion and transferring jurisdiction of the 2004 case to the Honorable James P. Mazzone. See, 6-22-2004 Order. This Order notes that the Defendant had no objection to the State's Motion. However, in the written acknowledgement for the consolidation, the attorneys for the Appellant reserved the right to move for a severance should it be determined that the consolidation was prejudicial to the Appellant.

On July 16, 2004, a hearing was held by the Circuit Court to consider a motion to withdraw as counsel filed by Brett M. Ferro and Michael Olejasz, which were the Appellant's fourth and fifth attorneys, respectively, in these proceedings. The previous three attorneys had developed conflicts in further representation of the Appellant. After

this hearing the Court granted the attorneys' motion. See, 7-16-2004 Order. By this Order, the Court appointed Kevin Neiswonger, Esquire as counsel for the Appellant.

On August 17, 2004, Mr. Neiswonger filed a Motion requesting the continuance of a evidentiary hearing set for August 19, 2004 citing "the voluminous amount of material that was associated with the charges."

On November 8, 2004, a status hearing was held where David White, covering for Mr. Neiswonger, filed a motion to continue the trial date that was previously set for November 16-17, 2004 citing a recent illness of the Appellant and "the voluminous discovery in this matter." See 11-8-2004 Order. The Court granted the Motion and reset the matter for trial on December 20-22, 2004.

On or about December 7, 2004, Mr. Neiswonger filed a motion to continue the December 20-22, 2004 trial date alleging, "[i]t is not fair to Counsel, nor is it fair to the Defendant, to expect Counsel to try such a voluminous and complicated case with a little over four months preparation time, when it is clear that other attorneys required much longer." See, 12-7-2004 Motion.

A hearing was held on December 7, 2004 where the Court granted the motion to continue and reset the trial date for March 29-31, 2005. See, 12-7-2004 Order. Also during this hearing, the Court heard testimony from former employees of a local Sears store concerning prior contact they had with the Appellant. The Court by request of the parties deferred ruling on the testimony and Ordered the Appellant to notify the Court no later than two weeks before February 25, 2005 should he desire to present testimony to dispute the testimony of the Sears employees. See 12-7-2004 Order.

On January 5, 2005, a trial deposition of Detective Keith Brown was had. During this deposition, Detective Brown testified as to out of court and unsworn statements given to him by J.L.R. The first set of statements alleged that the Appellant had sexually assaulted J.L.R. numerous times over multiple year period. A specific allegation was that the Appellant inappropriately touched J.L.R. while she was under eleven (11) years of age while she was taking a bath. In another statement provided to the Detective, J.L.R. reported that the Appellant told her that all daddies teach their daughter's this way. No objection to any of the hearsay testimony provided by Detective Brown was made by Mr. Neiswonger. Subsequent counsel, by written motion and oral argument, objected to the admission of the deposition at trial due to the extensive hearsay testimony. Later at the trial in this matter, the deposition was played to the jury over a repeated objection of the Appellant.

In January 2005, Mr. Neiswonger moved to withdraw as counsel for the Appellant citing a direct conflict between the Appellant and Rhonda Wade, Esquire, a law partner of Mr. Neiswonger. Subsequently, the Court granted Mr. Neiswonger's motion and appointed J. Perry Manypenny, Esquire as counsel for the Appellant.

On or about February 10, 2005, Mr. Manypenny moved to withdraw as counsel for the Appellant citing physical disability. On or about February 15, 2005, Judge Mazzone entered an Order appointing Christopher A. Scheetz, Esquire as the Appellant's attorney.

On March 3, 2005, a status hearing was held where the Appellant moved to continue the March 29, 2005 trial date in order to allow new counsel an opportunity to review the case file, prepare for motions and prepare for trial. (See 3-2-2005 Transcript

at page 3) The Appellant requested a trial date towards the end of the May term of the Circuit Court. The Court granted the motion to continue and set the matter for a pretrial hearing on March 29, 2005 and for trial beginning on July 5, 2005. (See 3-2-2005 Transcript at pages 6 and 8)

On March 11, 2005, the Court appointed Edward L. Gillison, Jr. as co-counsel for the Appellant.

On June 16, 2005, a pretrial hearing was held where the State sought permission to introduce evidence of non-indicted actions by the Appellant towards A.P. The State argued that the incidents of sexual conduct that were not indicted were *res gestae* and showed a lustful disposition on the part of the Appellant. (See 6-16-2005 Transcript at pages 61-62, See State of West Virginia's Seventh Supplemental Discovery Disclosure) Also, the State sought to introduce testimony stating that the Appellant had A.P. engage in sexual relations with other men during the time frame covered by the Indictment. (See 6-16-2005 Transcript at page 5-6) Also, the State sought to introduce testimony by Maude Proper stating that she witnessed the Appellant sleeping in the bed of a pick up truck with Jennifer Kinney and that she believed that the Appellant has set up a separate household with Jennifer Kinney. (See 6-16-2005 Transcript at pages 57-58) The Court denied the State's request for admission of the testimony of Ms. Proper. (see 6-16-2005 Transcript at page 64)

The Court then moved on to consider motions filed by the Appellant's new counsel, which were a Motion for Relief from Prejudicial Joinder; a Motion to Suppress Deposition of Keith Brown; Motion to Withdraw Stipulation to D.N.A. evidence; Motion for Independent Testing of D.N.A. samples; Motion to Renew Previously Filed Motions.

See, motions. After the hearing on June 16, 2005, the Court denied all of the Appellant's motions that were contested by the State including the prejudicial joinder motion; the motion to suppress the deposition; the motion to withdraw the stipulation and the motion for independent testing. See, 6-16-2005 Order.

On July 6, 2005 prior to the trial, a hearing was held on the Appellant's motion to Dismiss Misdemeanor Counts and to Compel Election by the State. After this hearing, the Court granted the motion to dismiss the misdemeanors and as such Ordered the misdemeanors dismissed. The Court denied the motion to compel election.

A jury trial was had in this matter from July 6, 2005 through July 9, 2005. The Appellant moved for a Judgment of Acquittal on the counts charging "Sexual Assault in the Second Degree" as to J.L.R, and the Court granted this motion. After the trial, the jury returned verdicts of guilty on two counts of "Incest" and on two counts of "Sexual Abuse by a Parent." Moreover, the jury returned verdicts of guilty on one count of "Sexual Assault in the First Degree" and on one count of "Sexual Abuse by a Custodian." Also, the jury returned guilty verdicts on thirty counts of "Sexual Assault in the Third Degree" and on thirty counts of "Sexual Abuse by a Custodian."

On August 8, 2005, the Appellant through counsel moved for a Judgment of Acquittal pursuant to Rule 29(c) of the West Virginia Rules of Criminal Procedure and moved for a new trial pursuant to Rule 33. (See motions) The grounds for the Rule 29 motion were, in regards to the convictions with J.L.R. as the victim, violation of the requirements set forth in Crawford v. Washington and insufficiency of the evidence and in regards to the convictions with J.P. and A.P. as the victim insufficiency of the evidence. (See motion, see 9-2-2005 Transcript at pages 3-5) The grounds raised in the

Rule 33 motion were prejudicial joinder of charges involving three separate victims, the admission of the Deposition of Detective Keith Brown, unlawful suppression of one of the Appellant's witnesses,¹ and failure to continue the trial date. (See motion, see 9-2-2005 Transcript at pages 8-13). After previously reviewing the motions and the State's responses and the record and considering oral arguments on September 2, 2005, the Circuit Court denied the Appellant's motions. (See 9-2-2005 Transcript at pages 7 and 17)

On September 2, 2005, a sentencing hearing was had on this matter. A Pre-Sentence report was submitted to the Court to which the Appellant offered objections. Next, during the sentencing hearing, the Appellant was permitted to allocate unto the Court. Also, Jack Klinesmith, the Appellant's pastor, Linda Yeater and Joann Anderson all provided statements to the Court requesting leniency for the Appellant. Then, A.P. provided a statement to the Court regarding sentencing and a statement from J.P. was provided to the Court regarding sentencing.

After which, the Court sentenced the Appellant on the 31 counts of "Sexual Abuse by a Custodian" to not less than ten (10) nor more than twenty (20) years in prison on each count. Next, the Court sentenced the Appellant on the 30 Counts of "Sexual Assault in the Third Degree" to not less than one (1) nor more than five (5) years in prison on each count. Then, the Court sentenced the Appellant on the 2 counts of "Sexual Abuse by a Parent" to not less than ten (10) nor more than twenty (20) years in prison on each count. Next, the Court sentenced the Appellant on the 2 counts of "Incest" to not less than five (5) nor more than fifteen (15) years in prison on each count.

¹ The ground relating to the Appellant's witness was withdrawn by the Appellant during the September 2, 2005 hearing on the motion. (See 9-2-2005 Transcript at page 10)

Finally, the Court sentenced the Appellant on the one count of "Sexual Assault in the First Degree" to not less than fifteen (15) nor more than thirty-five (35) years in prison. The Court Ordered that all of these sentences were to be served consecutively thus making the sentence for the Appellant not less than 385 nor more than 875 years.

STATEMENT OF THE FACTS

The January 2001 Term of the Ohio Grand Jury returned an eight (8) count Indictment against the Appellant alleging in Count One that the Appellant committed the offense of "Sexual Assault in the Second Degree" against J.L.R.; alleging in Count Two that the Appellant committed the offense of "Sexual Assault in the Second Degree" against J.L.R.; alleging in Count Three that the Appellant committed the offense of "Incest" against J.L.R.; alleging in Count Four that the Appellant committed the offense of "Incest" against J.L.R.; alleging in Count Five that the Appellant committed the offense of "Sexual Abuse by a Parent" against J.L.R.; alleging in Count Six that the Appellant committed the offense of "Sexual Abuse by a Parent" against J.L.R.; alleging in Count Seven that the Appellant committed the offense of "Sexual Assault in the First Degree" against J.P.; and alleging in Count Eight that the Appellant committed the offense of "Sexual Abuse by a Custodian" against J.P. (See January 2001 Indictment)

The May 2004 Term of the Ohio County Grand Jury returned a sixty-five (65) count Indictment against the Appellant.

AUTHORITIES AND ARGUMENTS

1) The Trial Court erred in Denying the Appellant's Motion for Judgment of Acquittal Because the Evidence Was Insufficient to Support a Guilty Verdict.

J.L.R. Allegations

Counts Three through Six of the 2001 Indictment against the Appellant charged incidents where J.L.R. was the alleged victim. The only evidence submitted by the State in regards to this charge was the Deposition of Detective Brown. In this Deposition, Detective Brown testified to an out of court statement given to him by J.L.R. accusing the Appellant of assaulting her. The Appellant previously objected to the admission of the Deposition on the grounds that the Appellant was represented by conflicted counsel and that this counsel had not objected to inadmissible evidence during the Deposition.

No other evidence regarding the allegations of J.L.R. was presented by the State. No physical evidence was presented. No eyewitnesses were presented. One of the witnesses of the State, Jennifer Kinney testified that she saw nothing inappropriate transpire between J.L.R. and the Appellant. 7-6-2005 Transcript, Vol. I, at page

This Court has developed a test for determining whether the weight of the evidence is sufficient at trial to overcome a Motion for Judgment of Acquittal and sustain a guilty verdict:

In a criminal case, a verdict of guilty will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of the evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done.

State v. Starkey, 161 W.Va. 517, 244 S.E.2d 219 (1978)

Moreover, the Court, in State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163, 174 (1995), stated, “the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.” The Court has also acknowledged, “[a]lthough manipulation on appeal of a jury verdict is an enterprise to be undertaken rarely, and in extraordinary circumstances, Atkins and Hatfield indicate that an appeals court may properly pass on the validity--in light of the evidence--of the jury's conclusions, if for the purpose of assessing the weight of the verdict against the magnitude of the error. The magnitude of this error measured against the weight of this verdict suggests that a reasonable doubt might well have been created by even insubstantial additional impeachment of this vital witness.” State v. Hall, 172 W.Va. 138, 143, 304 S.E.2d 43, 48 (1983).

In Crawford v. Washington, 541 U.S. 36 (2004), the United States Supreme Court ruled that admitting an out-of-court statement that is testimonial where the defendant did not have the opportunity to cross-examine the declarant violates the Confrontation clause of the Sixth Amendment to the U.S. Constitution. Therefore, the hearsay statement of J.L.R. to Detective Brown should never have been admitted and considered by the jury.

Furthermore, Detective Brown stated in his Deposition that his investigation showed that the Appellant did the acts charged in the Indictment. However, his investigation only consisted of the statement of J.L.R.

The Supreme Court of Appeals has developed a test in reviewing the sufficiency of the evidence to sustain a criminal conviction, [i]n a criminal case, a verdict of guilt will not be set-aside on the ground that it is contrary to the evidence, where the state's

evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution.² To warrant interference with a verdict of guilt on the ground of insufficiency of the evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done.” State v. Starkey, 161 W.Va. 517, ____, 244 S.E.2d 219, ____ (1978).

The Court has further explained, “[t]hus the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.” State v. Guthrie, 194 W.Va. 657, ____, 461 S.E.2d 163, 174 (1995).

In applying the foregoing test to the instant case, it is clear that the State failed to produce sufficient evidence to convict the Appellant on these counts. First, the State failed to produce sufficient evidence for a reasonable mind to have found the essential elements of the crime beyond a reasonable doubt. As stated above, there was no physical evidence presented nor was there presented any direct testimony by the victim. Thus, there were no eyewitnesses presented. In fact since the only evidence adduced at trial came from the deposition of Detective Brown regarding his investigation and further since his investigation only substantially involved the one statement made by J.L.R. to the detective, there was not even circumstantial evidence of guilt presented by the State at the trial. There was only presented an out-of-court statement made not under oath and not subject to cross-examination.

² Although in reviewing the harmlessness of an error involving the unconstitutional admission of evidence, the Supreme Court does not view the evidence in the light most favorable to the prosecution. *See infra*. Section ____.

The United States Supreme Court repeatedly has noted that “[t]he right to confrontation did not originate with the Sixth Amendment, but was a common-law right,” Salinger v. United States, 272 U.S. 542, 548 (1926), “which had been previously adopted in the several states.” United States v. Reid, 53 U.S. (12 How.) 361, 364 (1851); *see also* Lilly v. Virginia, 527 U.S. 116, 141 (Breyer, J., concurring); 3 Joseph Story, Commentaries on the Constitution of the United States 662 (1833) (Sixth Amendment “follow[ed] out the established course of the common law in all trials for crimes,” including right to confrontation). An examination of (1) this common law right to confrontation, (2) the Framers’ understanding of that right, and (3) this Court’s applications of it demonstrates that the Confrontation Clause prohibits the admission of all *ex parte* testimonial statements, including accomplices’ custodial confessions, against criminal defendants.

The right to confrontation has “a lineage that traces back to the beginnings of Western legal culture.” Coy v. Iowa, 487 U.S. 1012, 1015 (1988). The ancient Hebrews and the Romans required accusing witnesses to give their testimony in front of the defendant. *See id.*; Deut. 19:15-18; Frank R. Herrmann & Brownlow M. Speer, “Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause”, 34 Va. J. Int’l L. 481, 485-92 (1994) (recounting several examples in early Roman law). A twelfth-century treatise on ecclesiastical law in Europe likewise provided that “[i]n civil cases absent persons present testimony . . . when they cannot appearBut in criminal cases absent persons *never* give testimony, except against the contumacious when the case has already commenced.” *Id.* at 513 (translating Summa “Magister Gratianus in hoc opera” on C.3 q.9 (c. 1160 or 1170), *in* The Summa Parisiensis on the Decretum Gratiani 123

(Terrence P. McLaughlin ed. 1952). Even as continental Civil Law shifted towards more inquisitorial practices, the medieval English legal system generally adhered to the open and confrontational method of taking testimony. *See* John Fortescue, *On the Laws and Governance of England* 38-40 (1997).

“[T]he particular vice,” however, “that gave impetus to the confrontation claim” was the emergence in sixteenth century England of the continental ritual of trying defendants on evidence that “consisted solely of ex parte affidavits or depositions.” California v. Green, 399 U.S. 149, 157 (1970); *see also* 1 James Stephen, *A History of the Criminal Law of England* 221, 325 (1883). Magistrates generated these statements by examining alleged accomplices and other witnesses prior to trial. *Id.* The examinations were “intended only for the information of the court. The prisoner had no right to be, and probably never was, present.” *Id.* at 221. At the trial itself, in turn, “[t]he proof was usually given by reading depositions, confessions of accomplices, letters, and the like; and this occasioned frequent demands by the prisoner to have his ‘accusers,’ *i.e.*, the witnesses against him, brought before him face to face.” *Id.* at 326; *see also* 9 W.S. Holdsworth, *History of the English Law* 228 (1926). Yet “[t]he crown was not bound” by any clear rule “to produce its witnesses to be cross-examined by the accused,” so courts sometimes refused these demands for confrontation. 9 Holdsworth, *supra*, at 224, 228. The “infamous” trial of Sir Walter Raleigh for high treason in 1603 exemplified the unfairness of this state of affairs. White v. Illinois, 502 U.S. 346, 361 (1992) (Thomas, J., concurring in part and concurring in the judgment); *see generally* 1 Stephen, *supra*, at 333-36; 9 Holdsworth, *supra*, at 216-17, 226-28. The principal evidence against Raleigh was a transcribed examination of Lord Cobham, Raleigh’s alleged co-conspirator, in

which Cobham inculpated himself and Raleigh in a plot to seize the throne. When the prosecution presented this evidence, Raleigh demanded to “let my Accuser come face to face.” Trial of Sir Walter Raleigh, 2 How. St. Tr. 1, 19 (1809). Prior to trial, Cobham had written a letter absolving Raleigh in the plot, and Raleigh “believed that Cobham would now testify in his favor.” Green, 399 U.S. at 157 n.10. But the judges stated that “the law of the realm,” which they construed as barring one charged party from appearing at the trial of another, dictated that “lord Cobham cannot be brought.” Raleigh, 2 How. St. Tr. at 24. The judges nevertheless deemed Cobham’s confession reliable enough to be introduced against Raleigh. They emphasized that it was self-inculpatory, *id.* at 14, 19, “voluntary, and not extracted from [him] upon any hopes or promise of Pardon.” *Id.* at 29. It also – of particular relevance here – was consistent with portions of Raleigh’s pretrial examination and the confessions of other alleged accomplices. *Id.* at 17. The jury convicted Raleigh largely on the basis of Cobham’s extrajudicial testimony. Years later, one of his trial judges lamented that the trial “injured and degraded the justice of England”; another remarked that “I hope that we shall never see the like again.” Christopher Smith, “*Biography of Sir Walter Raleigh*,” in *Britannia Biographies*, pt. 15 (1999) <<http://www.britannia.com/bios/raleigh/out.html>>. The common law right to confrontation hardened to put an end to this practice. *See Green*, 399 U.S. at 156-57; 1 Samuel R. Gardiner, History of England 138 (1965); Daniel H. Pollitt, “*The Right of Confrontation: Its History and Modern Dress*,” 8 J. Pub. L. 381, 389-90 (1959). By the middle of the seventeenth century, witnesses were required to give their testimony face-to-face, and the accused had the right “to cross-examine the witnesses against him if he thought fit.” 1 Stephen, *supra*, at 358. Accordingly, in 1662, the King’s Bench ruled

unanimously that although a custodial confession was valid “evidence against the party himself who made the confession,” it “cannot be made use of as evidence against any others whom on his examination he confessed to be in the [crime].” Case of Thomas Tong, Kelyng J., 17, 18, 84 Eng. Rep. 1061-62 (1662). This right to confrontation was a bright-line rule. Even if a witness died, his prior *ex parte* statement to a governmental officer could not be admitted against the accused because the defendant “could not cross-examine” the declarant. Rex v. Paine, 90 Eng. Rep. 1062, 1062 (K.B. 1696) (statement to justice of the peace); *see also* Eade v. Lingood, 1 Atk. 203 (1747) (deposition before bankruptcy commissioners). The writings of Hale and Blackstone confirm that the common law established a categorical rule that incriminating testimony be provided at trial and be subjected to cross-examination. Hale explained that cross-examination “beats and boults out the Truth much better” than *ex parte* examinations with “limited . . . Interrogatories in Writing.” Matthew Hale, *The History of the Common Law of England* 164 (Charles M. Gray ed. 1713). The common law thus provided that “by [the] personal Appearance and Testimony of Witnesses, there is Opportunity of confronting the adverse Witnesses; . . . and by this Means great Opportunities are gained for the true and clear discovery of the Truth.” *Id.* Blackstone’s description of the right to confrontation, which is even more detailed, is similarly absolute in requiring the prosecution to establish its case through live witnesses:

This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk in the ecclesiastical courts and all others that have borrowed their practice from civil law: where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal. There an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and

language; but he is here at liberty to correct and explain his meaning, if misunderstood, which he can never do after a written deposition is once taken. Besides the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled: and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial. . . . In short by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behavior, and inclinations of the witness, in which points all persons must appear alike, when their depositions are reduced to writing, and read to the judge, in the absence of those who made them: and yet as much may be frequently collected from the manner in which the evidence is delivered, as from the matter of it.

3 William Blackstone, Commentaries on the Laws of England 373-74 (1768).

Witnesses were required to be available for cross-examination, in short, because this procedure was viewed as the “only” acceptable way of taking potentially incriminating testimony. *Id.* at *373. No other method –especially not *ex parte* depositions – was trusted to “sift out the truth.” *Id.*

By the time that America’s colonization was beginning in earnest, it was “settled doctrine” under the common law system that *ex parte* testimonial statements incriminating criminal defendants were inadmissible because “statements used as testimony must be made where the maker can be subjected to cross-examination.” 5 Wigmore on Evidence § 1364, at 26 (Chadbourn rev. 1974). This rule flatly prevented the government from using accomplices’ custodial statements against anyone other than themselves.

The Confrontation Clause’s Codification of the Common Law Rule.

States and the Framers of the Sixth Amendment adopted the common law right to confrontation in order to prohibit abuses such as those in Raleigh’s trial from ever

coming to roost in the United States. See United States v. Inadi, 475 U.S. 387, 411 (Marshall, J., dissenting) (“The plight of Sir Walter Raleigh, condemned on the deposition of an alleged accomplice who had since recanted, may have loomed large in the eyes of those who drafted that constitutional guarantee.”); Mattox v. United States, 156 U.S. 237, 242 (1895) (“primary object” of Confrontation Clause is “to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness”); Francis H. Heller, *The Sixth Amendment* 104 (1951) (tracing Clause to reaction to Raleigh’s trial). Like the English lawyers and judges before them, Americans understood this right to confrontation as prohibiting a nontestifying accomplice’s examination or other *ex parte* testimony from ever being introduced against a criminal defendant. While defending a client in a criminal case, for instance, John Adams noted that “[e]xaminations of witnesses upon Interrogatories, are only by the Civil Law. Interrogatories are unknown at common Law, and Englishmen and common Lawyers have an aversion to them if not an Abhorrence of them.” 2 Legal Papers of John Adams 207 (Wroth & Zobel eds., 1965). The first Continental Congress delivered an address to foreigners detailing “the essential rights of the colonists,” stressing that among these rights was the right of people accused of crimes to “full enquiry, face to face, in open court” concerning any testimony offered against them. *Sources of Our Liberties* 284 (Richard L. Perry ed. 1959) (quoting 1 *Journals of the American Congress, 1774-1788* 41-42 (1823)). Thus, when an Antifederalist leader in the struggle for a bill of rights complained that the proposed constitution omitted “essential rights, which we have justly understood to be the rights of freemen,” he quickly mentioned the right to confrontation and characterized it as an absolute

procedural right: "Nothing can be more essential than the cross examining witnesses, and generally before the triers of the facts in question." Richard Henry Lee, *Letter IV by The Federal Farmer* (Oct. 15, 1787), reprinted in 1 Bernard Schwartz, *The Bill of Rights: A Documentary History* 469, 473 (1971). The author further explained that written testimony, even if given merely for expediency rather than in bad faith, was "almost useless; it must be frequently taken *ex parte*, and but very seldom leads to the proper discovery of truth." *Id.*

Shortly after the Bill of Rights was adopted, Chief Justice Marshall applied the Confrontation Clause in the trial of Colonel Aaron Burr in a manner that confirmed its prohibition against using *ex parte* testimonial statements to convict criminal defendants. The federal government indicted Burr for plotting to lead an illegal military expedition and sought to introduce declarations "tending to implicate Colonel Burr" that one Blennerhassett gave after the alleged plot was snuffed out. United States v. Burr, 25 F. Cas. 187, 193 (C.C. Va. 1807) (No. 14,694). The government argued that even though Blennerhassett was unavailable to testify at trial, his declarations were admissible because they related to a conspiracy and because he and Burr "were accomplices." *Id.* In addition to ruling that the declarations were not admissible as conspiratorial statements because they were not given in furtherance of the alleged wrongdoing and because the government did not allege a conspiracy in any event, Chief Justice Marshall emphatically rejected the government's alternative argument that Blennerhassett's declarations were admissible as accomplice confessions: I know not why . . . a man should have a constitutional claim to be confronted with the witnesses against him, if mere verbal declarations, made in his absence, may be evidence against him. I know of no principle in

the preservation of which all are more concerned. I know of none, by undermining which, life, liberty, and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important. *Id.* at 193. Chief Justice Marshall then explained how the Confrontation Clause operated, echoing the King's Bench's decision in *Tong's Case* a century and one-half before: [W]here A., B., and C. are indicted for murdering D., . . . the declarations of one of the parties made in the absence of the others have *never* been admitted as evidence against the others.

....

. . . If, for example, one of several men who had united in committing a murder should have said, that he with the others contemplated the fact which was afterwards committed, I know of *no case* which would warrant the admission of this testimony upon the trial of a person who was not present when the words were spoken. *Id.* at 194-95 (emphasis added). Applying this bright-line rule, Chief Justice Marshall concluded that "the declarations of third persons not forming part of the transaction, and not made in the presence of the accused, cannot be received as evidence in this case." *Id.* at 198. He never inquired into whether Blennerhassett's confession interlocked with any statement Burr had offered or whether it otherwise evinced indications of reliability. The fact that Blennerhassett's declarations were given outside Burr's presence was enough to render them inadmissible.

Contemporary state court decisions applying parallel state provisions confirm that the American right to confrontation, replicating the common law right, was intended to bar the introduction of all incriminating testimony that had not been subjected cross-

examination.³ In State v. Webb, 2 N.C. (1 Hayw.) 103 (1794), the first reported decision involving a state confrontation provision, the North Carolina court refused to allow an *ex parte* deposition to be read into evidence against the accused, explaining that “it is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine.” *Id.* at 103. A Tennessee court later expressed agreement with Webb, and upheld the admission of a deceased witness’s prior accusatory testimony under the state confrontation clause only because it had been offered in the defendant’s presence where “he had the liberty to cross-examine” the witness. Johnston v. State, 10 Tenn. (2 Yer.) 58, 59 (1821). The highest court in South Carolina, moreover, overturned a conviction because the trial court admitted a sworn deposition to a coroner implicating defendant. Brushing aside any suggestion that the “solemnity of the occasion or the weight of the testimony” permitted its admission, the court ruled that “such depositions are *ex parte*, and, therefore, utterly incompetent.” State v. Campbell, 30 S.C.L. (1 Rich.) 124, 1844 WL 2558, at 1 (1844).

When the United States Supreme Court first considered the Confrontation Clause at length, it properly treated the right to confrontation, “in light of the law as it existed at the time it was adopted,” Mattox, 156 U.S. at 243, as a procedural requirement that all testimony offered against the accused be subject to cross-examination. This Court thus

³ 2 Several states adopted bills or declarations of rights prior to the adoption of the federal Constitution, and every one of them explicitly provided for the right to confrontation. *See* Va. Bill of Rights § 8 (1776); Pa. Const. § A(IX) (1776); N.C. Decl. of Rights Art. VII (1776); Del. Decl. of Rights § 14 (1776); Md. Decl. of Rights Art. XIX (1776); Vt. Decl. of Rights Art. X (1777); Mass Const. Art. XII (1780); N.H. Bill of Rights Art. XV (1784). Several early court decisions in other states confirm that they, too, intended to codify the common law right. *See, e.g., Anthony v. State*, 19 Tenn. (Meigs) 265, 277-278 (1838) (state confrontation clause “was not to introduce a new principle” but to preserve a right won in England “after a long contest with the crown”); *Campbell v. State*, 11 Ga. 353, 374 (1852) (“The right of a party accused of a crime, to meet the witnesses against him, face to face, is no new principle. It is coeval with the Common Law.”); *Summons v. Ohio*, 5 Ohio St. 325, 340 (1856) (same).

endorsed the South Carolina Court of Appeals' decision in Campbell, observing that since the testimony there was taken in the absence of the accused, "*of course* it was held to be inadmissible." Mattox, 156 U.S. at 241 (emphasis added). In contrast, this Court held in the case before it that the Confrontation Clause permitted the admission of testimony from a prior trial involving the same defendant and the same charge. "The substance of the constitutional protection," this Court explained, "is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination." *Id.* at 244. There is no mention anywhere in the opinion of the admissibility of out-of-court testimony turning on its purported reliability; the sole test was whether it had been subjected to cross-examination, a right that this Court stated defendants "*shall under no circumstances* be deprived of." *Id.* at 244 (emphasis added).⁴

Other decisions during this period followed the same pattern. Motes v. United States, 178 U.S. 458 (1900), much like this Crawford, involved the prosecution's use of an accomplice's "statement in the nature of a confession" that implicated the accused individuals in the charged offense, one of whom also confessed to the crime. *Id.* at 470-72. The accomplice had given his confession at the defendants' preliminary examination and then absconded. At trial, the government offered the accomplice's prior testimony as evidence against the other defendants. On review, this Court held that the admission of this testimony violated the confrontation rights of *all* of the other defendants, including

⁴ In construing the confrontation section of the Philippine Bill of Rights, which is "substantially the provision of the 6th Amendment," the Supreme Court similarly explained that the section "intends to secure the accused the right to be tried, so far as facts provable by witnesses are concerned, by *only* such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give the accused an opportunity for cross-examination." Dowdell v. United States, 221 U.S. 325, 329-30 (1911) (emphasis added).

the one who also had confessed. *Id.* at 471. This Court found it unnecessary to inquire whether the accomplice's confession interlocked with the other defendant's or appeared otherwise reliable. Rather, this Court followed an opinion from the Queen's Bench terming it an "absolute" rule that the accused have "a witness for the prosecution against him examined and cross-examined before the jury." *Id.* at 473-74 (quoting Regina v. Scaife, 2 Den. C.C. 281, 285 (1851) (Lord Campbell, C.J.)).

In another case, the Supreme Court likewise applied the unequivocal common law rule that an accomplice's "confession is no evidence against the prisoner" in holding that an accomplice's guilty plea for theft was inadmissible against the accused to prove that the property he received was stolen. Kirby v. United States, 174 U.S. 47, 53-60 (1899). Once again, this Court made no reference to any possible exception for interlocking or otherwise reliable confessions.

Modern Jurisprudence.

The results of the Supreme Court's modern confrontation decisions accord with the traditional prohibition against admitting any incriminating testimonial statements that have not been subjected to cross-examination. This Court has found the Confrontation Clause violated each time it has considered a criminal case in which the prosecution introduced a nontestifying accomplice's custodial statement or a nontestifying witness's prior testimony that was not subject to cross-examination. See Lilly, 527 U.S. 116 (accomplice's custodial confession); Idaho v. Wright, 497 U.S. 805 (1990) (alleged victim's statements to doctor made in apparent coordination with police's investigation of defendant); Lee v. Illinois, 476 U.S. 530 (1986) (accomplice's custodial confession); Berger v. California, 393 U.S. 314 (1969) (per curiam) (preliminary hearing testimony);

Brookhart v. Janis, 384 U.S. 1 (1966) (accomplice's custodial confession); Douglas v. Alabama, 380 U.S. 415 (1965) (accomplice's custodial confession); Pointer v. Texas, 380 U.S. 400 (1965) (testimony at preliminary hearing). In a series of cases beginning with Bruton v. United States, 391 U.S. 123 (1968), this Court also has held that in joint trials the Confrontation Clause prohibits the admission of nontestifying accomplices' custodial confessions against even the accomplices themselves when the confession also incriminates the codefendant. *See also* Roberts v. Russell, 392 U.S. 293 (1968) (per curiam); Cruz v. New York, 481 U.S. 186 (1987); Gray v. Maryland, 523 U.S. 185 (1998). The reason for this rule is that even if a judge instructs jurors to consider such a confession as evidence against only the accomplice, it is too likely that the jurors nevertheless will take it into account in adjudicating the guilt of the codefendant, in violation of the codefendant's right to confrontation. *E.g.*, Bruton, 391 U.S. at 135

At the same time, this Court has condoned the use of an unavailable witness's prior testimony against the accused when the witness was subject to cross-examination during the prior testimony. *See* Ohio v. Roberts, 448 U.S. 56 (1980) (preliminary hearing testimony where witness was subject to "the equivalent of significant cross-examination"); Mancusi v. Stubbs, 408 U.S. 204 (1972) (testimony from a prior trial on same charges where witness was subject to "adequate" cross-examination); Green, 399 U.S. 149 (preliminary hearing testimony when witness was subjected to "full" cross examination). This Court also has allowed the prosecution to introduce hearsay statements against defendants when the statements were made under nontestimonial circumstances—that is, when they were made without litigation in mind. *See* White, 502 U.S. 346 (spontaneous declaration and medical treatment statement by a child); Bourjaily

v. United States, 483 U.S. 171 (1987) (co-conspirator's statement to another coconspirator); United States v. Inadi, 475 U.S. 387 (1986) (same); Dutton v. Evans, 400 U.S. 74 (1970) (same). The landscape of these decisions, interpreted through the prism of the traditional understanding of the right to confrontation, evokes a straightforward rule: The Confrontation Clause bars the government in criminal cases from introducing "testimony" that is not subject to (and has not previously been subjected to) cross-examination by the defendant. In concrete terms, this rule prohibits the prosecution from introducing *ex parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially. *See White*, 502 U.S. at 365 (Thomas, J., concurring in part and concurring in judgment). The Clause, however, does not apply to hearsay statements made unrelated to any pending or potential prosecution.

The Court further recognized the right to confront one's accusers is a concept that dates back to Roman times. Crawford, 541 U.S. at 43. And from its earliest days, the right to confrontation has been understood (as that passage from Crawford suggests) to apply with special solicitude to out-of-court statements that are *accusatory* in nature. The right, at its core, prohibits criminal prosecutions based on out-of-court accusations.

The Bible twice refers to the right to confrontation, and both times it characterizes it as the right to confront one's accuser. Most famously, the Book of Acts recites that [t]he Roman Governor Festus, discussing the proper treatment of his prisoner, Paul, stated: It is not the manner of the Romans to deliver any man up to die before the accused has met *his accusers* face to face, and has been given a chance to defend himself against

the charges. Book of Acts 25:16 (emphasis added), *quoted in Coy v. Iowa*, 487 U.S. 1012, 1015-16 (1988). In addition, a popular mid-18th century manual for English justices of the peace cited the New Testament's cast the first stone parable for the proposition that no man is to be condemned without an *Accuser*. See Michael Dalton, *The Country Justice* 379 (1746) (emphasis added). In the parable, the Scribes and Pharisees brought a woman before Jesus, told him that she had been caught in the act of adultery, and asked how she should be punished. After Jesus challenged him that is among you without sinne to cast the first stone, the accusers slunk away, and Jesus let the woman go. John 8:7.

As commentators later have explained, the 18th century manual makes sense only if accuser means someone willing to face the accused and make the accusation; it is obvious from the Biblical passage that there were in fact accusers, but they had refused to confront the accused when it became apparent that this would require them to open their own character to impeachment. Charles Allen Wright & Kenneth W. Graham *Federal Practice and Procedure: Evidence*, § 6342, at 241-422 & n.403 (1997).

This traditional understanding of the right to confrontation as a right, at its core, to confront one's accuser was carried forward through the centuries. See generally Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 Va. J. Int'l L. 481 (1994). When the notorious English treason trials of the 16th and 17th centuries strayed from strictly respecting the right, see *Crawford*, 541 U.S. at 43-45, the defendants complained that the prosecutions denied them the opportunity to confront their accusers. For instance, Sir Walter Raleigh whose trial in 1603 the Framers thought was a paradigmatic confrontation violation, *id.* at 52

repeatedly demanded to let my *accuser* come face to face and be deposed[.] Trial of Sir Walter Raleigh, 1 *Jardine s Criminal Trials* 389, 427 (1832) (emphasis added); *see also id.* at 418 (But, my Lords, I claim to have my *accuser* brought here face to face to speak.) (emphasis added); *id.* at 420 ([I]f [Lord Cobham] will then maintain his *accusation* to my face, I will confess myself guilty.) (emphasis added). After England reformed its law during the 17th and 18th centuries to prevent such abuses, it became firmly established at common law that an accuser was thought of as a witness who instigated the prosecution, and his direct and open participation in the case was indispensable. Leonard W. Levy, *Origins of the Fifth Amendment* 29 (1968); *see generally Crawford*, 541 U.S. at 44-47.

Historically, therefore, the inclusion of the Confrontation Clause in the Bill of Rights reflected the Framers conviction that the defendant must not be denied the opportunity to challenge *his accusers* in a direct encounter before the trier of fact. Ohio v. Roberts, 448 U.S. 56, 78 (Brennan, J., dissenting) (emphasis added). And even well into the latter part of the 20th century, this Court reaffirmed that the Confrontation Clause was meant to ensure that the accused and *the accuser* engage in an open and even contest in a public trial. Lee v. Illinois, 476 U.S. 530, 540 (1986) (emphasis added); *see also California v. Green*, 399 U.S. 149, 179 (1970) (Harlan, J., concurring) ([T]he Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, *trials by anonymous accusers, and absentee witnesses*) (emphasis added); Bruton v. United States, 391 U.S. 123, 138 (1968) (Stewart, J., concurring) (*[A]n out-of-court accusation is universally conceded to be constitutionally inadmissible against the accused.*) (emphasis added).

The Sixth Amendment, in other words, constitutionalize[d] the right in an adversary criminal trial to make a defense as we know it. Faretta v. California, 422 U.S. 806, 818 (1975). And the Framers understood the right to cross-examine one's accuser as absolutely central to such an adversary process. *Id.*; see also White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment) (describing the Confrontation Clause's emphasis on the adversary process); Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternate History*, 27 Rutgers L.J. 77, 168 (1995) (same). If [under Crawford] we are to imagine the Framers' reaction to practices that did not exist at the time, we could imagine few practices that would have been more abhorrent to their values than modern-day victimless prosecutions based on out-of-court accusations. Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. Rich. L. Rev. 511, 607 n.548 (2005).

However, in this matter J.L.R. did testify during the Preliminary Hearing held in the case, but the State made no attempt to have the transcript of this Hearing presented to the jury where the statements of J.L.R. were contested. Instead, the State only sought to submit the Deposition of Detective Brown where the damning allegations were not fully contested by conflicted counsel.

Therefore, the State presented no valid evidence showing that the Appellant committed the acts alleged in Counts Three through Six of the Indictment against him and thus no reasonably prudent person could conclude beyond a reasonable doubt that the Appellant committed the acts alleged in these counts.

J.P.

The only evidence presented by the State regarding the allegations of J.P., found in Counts Seven and Eight of the 2001 Indictment, was the uncorroborated testimony of J.P. The evidence of J.P. indicated that it was years after the event that she told anyone about the assault. Moreover, the allegations of J.P. did not fit the pattern of assaults alleged by the State. No evidence of actual physical force was presented in regards to J.L.R., A.P. or the 404(b) witness, Jennifer Kinney. No evidence of fear in the other females was presented. A.P. testified she was brainwashed. Jennifer Kinney testified she fell in love with the Appellant. J.L.R. did not testify.

Furthermore, there was no physical evidence presented. There was no eyewitness evidence presented. Also, Sergeant Mackey testified that the Appellant proclaimed his innocence when he spoke with him. On the other hand, Bonnie Bonar testified that her investigation showed that the Appellant committed the acts charged in the Indictment against him. However, her investigation consisted only of the statement of J.P.

Moreover, evidence was adduced that during the time the allegations of J.P. were raised, A.P., while staying with the Appellant, was threatening their mother that she (A.P.) was going to the police with a story that would result in imprisonment of their mother. Fear of her mother being imprisoned would have given J.P. a motive to make allegations against the Appellant.

Given the weaknesses of the State's evidence regarding these Counts, no reasonably prudent person could conclude beyond a reasonable doubt that the Appellant committed these acts.

A.P.

In regards to the Counts of the 2004 Indictment involving A.P., the State presented her direct testimony, 404(b) evidence from Jennifer Kinney of some conduct at a gas station, and 404(b) evidence from two Sears employees. First, the testimony of A.P. implicating the Appellant was directly in conflict with the statement she gave to Detective Brown in 2000. During her statements to Detective Brown, the F.B.I. and child protective service investigators, A.P. said that the Appellant had not harmed her in anyway and that no inappropriate conduct had occurred or was occurring. On the witness stand, A.P. testified that the reasons she did not implicate the Appellant to Detective Brown was that she was either scared or brainwashed. As to being scared, when she gave the statement to Detective Brown she had been removed from the household of the Appellant and she was in the Wheeling Police station, well protected from Mr. Reed. Also, evidence was presented that showed that she and the Reeds often went to the Lewis Wetzel Gun Club where many of the members are police officers. She would have been protected in this instance as well should she have given a statement implicating the Appellant.

The brain washing explanation was not as clearly presented. However, it took her approximately three years after being removed from the household of the Reeds for her to make a statement implicating the Appellant. No evidence was presented regarding treatment in the meantime to free her from the prior brain washing.

Next, A.P. did not corroborate the testimony given by Jennifer Kinney and the Sears employees. First, A.P. did testify that she and the Reeds had gone to gas stations on Wheeling Island. However, she did not testify that anything inappropriate occurred on any of these trips. Second, A.P. did testify that she and the Reeds had gone to Sears;

however, she did not testify in regards to anything inappropriate occurring there. Finally, the Sears employees testified that they believed that they witnessed the same event, but the Sears employees differed on what happened and where it happened.

Finally, evidence was presented that A.P. knew the Appellant had information that she believed could lead to the imprisonment of her mother. Her testimony regarding the exact nature of this information was limited due to Rape Shield Protections, but it was clear from the evidence that if the information in the possession of the Appellant was in fact true, it could lead to significant criminal proceedings against her mother. Moreover, it was adduced at trial that her mother was afraid of this information and the allegations surrounding it. A.P. testified that she at the time of her testimony did not want to see her mother go to jail. Thus, fear over this information and the pursuit of possible criminal charges created a bias in A.P. that led to the change of her prior statement into the testimony that she presented at trial.

Given the weaknesses of the State's evidence regarding the 2004 Indictment, no reasonably prudent person could conclude beyond a reasonable doubt that the Appellant committed these acts.

12) The Admission of Detective Brown's Deposition Violated the Appellant's Right to Counsel Free from Conflict and the Appellant's Right to Confront Witnesses Against him.

Prior to trial, the Appellant moved to suppress the deposition testimony of Detective Brown. See 6-16-2005 Transcript at pages 91-105. Motion to Suppress the Deposition of Detective Brown, dated May 12, 2005. It was asserted therein that the Appellant was represented by Kevin Neiswonger, Esquire, during the Deposition of

Detective Brown. Prior to the Deposition, Mr. Neiswonger notified the Court that he had a conflict of interest in representing the Appellant (See Transcript). It appears that a partner or an associate of Mr. Neiswonger was appointed to represent the Appellant in his Abuse and Neglect case on appeal, but that the partner or associate did not file the appeal, and the Appellant was contemplating legal action against the partner or associate. The Appellant had notified Mr. Neiswonger of this fact, and Mr. Neiswonger determined that this created a conflict with his further representation of the Appellant.

The Sixth Amendment to the U.S. Constitution and Article III § 14 of the West Virginia Constitution have been read to dictate that the accused is entitled to be effectively represented by counsel during all criminal proceedings up to sentencing. State ex. rel. Riffle v. Thorn, 153 W.Va. 76, 168 S.E.2d 810 (1969); State ex. rel. May v. Boles, 149 W.Va. 155, 139 S.E.2d 177 (1964).

The Supreme Court of Appeals has further ruled that “Where a constitutional right to counsel exists under W.Va. Const. Art. III, § 14, there is a correlative right to representation that is free from conflicts of interest.” Cole v. White, 180 W.Va. 393, 376 S.E.2d 599 (1988), syl. pt. 2.

At trial, the Deposition of Detective Brown was the only evidence submitted by the State regarding the charges involving J.L.R. In the Deposition, Detective Brown testified to the allegations made to him by J.L.R. 7-6-05, Vol. I, Transcript at page 174.⁵ This was hearsay that was not objected to by Attorney Neiswonger during the deposition.

⁵ The substance of Detective Brown’s testimony does not appear in the Trial Transcript. The Court had previously Ordered the State to provide defense counsel with a copy of the transcript of Detective Brown’s deposition (See 6-16-2005 Transcript at 106); however, defense counsel has not yet received any transcript from this deposition and as such cannot provide citation unto the Court to any transcripts. Therefore, all citations in this section will be to the entire deposition as recorded on disk and placed in the Circuit Clerk’s file.

J.L.R. never appeared to testify at the trial. There was no physical evidence underlying the allegations concerning her. There was no admission by the Appellant. There was no eyewitness to the events alleged. The only evidence adduced was an unsworn out-of-court statement given by J.L.R. to an officer.

Rule 802 of the West Virginia Rules of Evidence provides, “[h]earsay is not admissible except as provided by these rules.” Rule 801(c), indicates that hearsay “is a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Clearly, the statement of J.L.R. to the Detective was hearsay under Rule 801 and as such the statement was inadmissible under Rule 802. The declarant, J.L.R., was deemed by the trial court to be available. *See, infra*. Therefore, none of the unavailability exceptions applies. Moreover, the Trial Court noted no exceptions set forth in Rule 803 applied. Moreover, the Supreme Court has noted that besides being untrustworthy, hearsay presents the additional problem of conflicting with the defendant’s constitutional right of confronting adverse witnesses. *See, State v. Browning*, 199 W.Va. 417, 485 S.E.2d 1 (1997). Therefore, it was both an evidentiary error and a constitutional error to admit these statements over the objection of the Appellant.

The Trial Court noted that Mr. Neiswonger did not object to the Detective testifying to statements made to him by J.L.R. during the deposition. Based upon the lack of objection, under Rule 103(a)(1), the Court refused to consider the admissibility issue. However, Rule 103(d) provides that “[n]othing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court [by objection].” Moreover, Rule 52(b) of the West Virginia Rules of

Criminal Procedure directs, “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.”

The Supreme Court has noted, that the “plain error doctrine is properly applied where an important constitutional right is at stake.” State v. Harris, 189 W.Va. 423, _____, 432 S.E.2d 93, _____ (1993). The Court has further explained, “[u]nder the plain error doctrine, ‘waiver’ of error must be distinguished from ‘forfeiture’ of a right. A deviation from a rule of law is error unless there is a waiver. When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of the deviation from the rule of law need not be determined. By contrast, mere forfeiture of a right—the failure to make timely assertion of the right—does not extinguish the error. In such a circumstance, it is necessary to continue the inquiry and to determine whether the error is ‘plain.’ To be ‘plain’ the error must be ‘clear’ or ‘obvious.’” State, ex rel., Morgan v. Trent, 195 W.Va. 257, 465 S.E.2d 257 (1995).

In the instant case, the inclusion of hearsay relating to the Detective testifying to what J.L.R. told him and to the statement purportedly by the Appellant told to J.L.R. and then told to the Detective is both a clear and obvious error. The first evidence is hearsay; the second evidence is double hearsay.

In response the Court’s ruling allowing the admission of the full Deposition testimony by Detective Brown, the Appellant attempted unsuccessfully to introduce sworn statements given by J.L.R. admitting that she lied to Detective Brown as a refutation of the Deposition testimony; however, the trial court ruled these sworn statements inadmissible as being hearsay and as such barred under Rule 802. (see 6-16-

2005 Transcript at page). Moreover, the Detective testified that J.L.R. told him that the Appellant told her "this was what all daddies teach their daughters." Attorney Neiswonger also did not object to this double hearsay. See disc of deposition testimony. Such an expression could not be construed in any other way except as being extremely inflammatory to the jury thus extremely prejudicial to the Appellant.

Therefore, the admission of the Deposition of Detective Brown unduly prejudiced the Appellant, and its admission at trial constituted reversible error by the trial court.

23) The State's Failure to Provide Psychological Records and Criminal Records of A.P. and J.P. Violated Article III, Section 14 of the W.Va. Constitution and Brady and its progeny.

Regarding requested information by the defense through discovery, the Supreme Court of Appeals has stated, "[t]his court recognized in State v. McArdle, 156 W.Va. 409, 194 S.E.2d 174, 178-179 (1973), that the prosecutor's failure to disclose after demand evidence favorable to the accused violates the due process constitutional guarantee." There can be little doubt that the reference was to the Due Process Clause, Article III, Section 14 of the West Virginia Constitution. In this matter the psychological records of A.P. and J.P. were never provided to the Appellant nor were the criminal records of these individuals provided.

State v. Cowan, 156 W.Va. 827, 197 S.E.2d 641, 644-648 (1973) dealt extensively with an analogous question of the prosecutor's failure to comply with Court-ordered discovery and the use of such non-produced material at trial to surprise the defendant...The Court in Cowan utilized our criminal discovery statute, W.Va. Code 62-1B-2, to set the standard that where a discovery motion is granted and the prosecutor fails

to comply, prejudicial error may result. In determining whether the error is prejudicial, we must determine whether 'the defense is surprised on a material issue' or if the non-disclosed material 'hampers the preparation and presentation of the defendant's case.'"

Wilhelm v. Whyte, 161 W.Va. at 71, 239 S.E.2d at 737-738.

In the instant case, A.P. and J.P. testified that the actions of the Appellant caused them severe psychological damage. J.P. testified that she because of the Appellant suffered from bi-polar disorder. Prior to trial, the Appellant requested the psychological records of both women from the State. On November 1, 2002, the Trial Court Ordered the production of said records. (See 11-1-2002 Order) The records were never produced. Without the records, the Appellant was without information to adequately counter the disclosures of A.P. or J.P. regarding their psychological conditions and the impact that the Appellant had on their conditions.

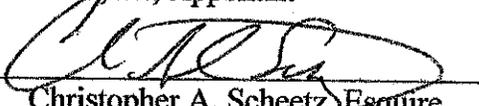
Furthermore, the criminal records of A.P., J.P., J.L.R. and Jennifer Kinney were not disclosed to the Appellant.

CONCLUSION

For all of the foregoing reasons, the Appellant respectfully requests that this Honorable Court grant his Petition for Appeal, reverse his convictions and Order his Indictments dismissed or in the alternative remand his case to the Ohio County Circuit Court for further proceedings or any other relief that justice demands.

Respectfully Submitted,

Ronald Reed, Sr., Appellant

By: 

Christopher A. Scheetz, Esquire
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W.Va. Bar Id. 8851

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,)

Appellee,)

v.)

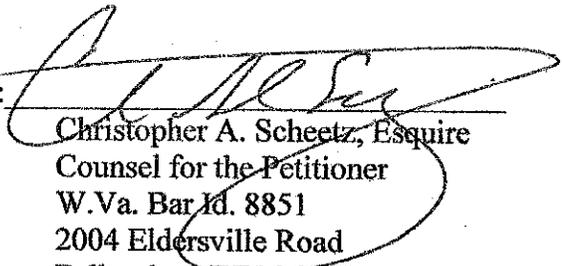
Supreme Court No.34136)

RONALD REED, SR.,)

Appellant.)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the Appellant's Brief was had upon the Appellee State of West Virginia this 25th day of August 2008 by hand-delivery of a true and correct copy thereof to Scott Smith, Esquire Prosecuting Attorney, or his duly recognized agent at the Office of the Ohio County Prosecuting Attorney, 1500 Chapline Street, Wheeling, WV 26003.

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