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FIRST ERROR

The trial judge abused his discretion and created plain error when he permitted the state's witness, Sally Keefer, to testify to hearsay evidence over the constant objection of Defense Counsel. The judge preserved defense Counsel's objections for the record. Ms. Keefer, the alleged child victim's foster mother, testified about statements made to her by the alleged victim. As a result of said abuse of discretion, the admission of hearsay testimony, the jury was enraged and the appellant could not receive a fair trial.

Upon each objection to the admissibility, the trial court judge would say that if the testimony was introduced for the purpose of the truth of the facts being asserted, it was indeed clearly hearsay and inadmissible as evidence. The trial court judge agreed that if it was being introduced for the truth of the facts, he would have to sustain the defense counsel's objection, unless the prosecutor had another purpose which would be an exception to the hearsay rule. First, the prosecutor loudly responded by representing to the Court that there is a "huge exception," *The State v. Petri* (trial transcript P. 19 L. 14-15).

Mr. Kahle was in error in his interpretation of the case of *State of West Virginia, Plaintiff v. Jeffrey Allen Petri, Defendant* (209 W.Va. 449, 559, S.E. 2d, 323, 2001). Mr. Kahle explained to the trial court his interpretation and belief that the above mentioned case makes a "huge exception" for the admissibility of hearsay evidence, in that "...similar statements, as that being introduced by this witness (Keefer) were upheld on appeal."

In *State of West Virginia, Plaintiff v. Jeffrey Allen Petri, Defendant* (209 W.Va. 449, 559, S.E. 2d, 323, 2001), Mr. Jeffrey Allen Petri was indicted by the Mercer County, West

Virginia, Grand Jury on four (4) counts of sexual assault in the first degree, four (4) counts of incest and four (4) counts of sexual abuse by a parent in violation of the West Virginia Code.

The State of West Virginia intended to introduce testimony from Ms. Hasty, a child counselor at Southeastern Highlands Community Mental Health Center. The defendant argued that the children's statements to Ms. Hasty were hearsay and should not be admitted as evidence. The trial court found that Ms. Hasty was indeed a professional and that her testimony was admissible under the medical diagnosis treatment exception to the hearsay rule, West Virginia Rules of Evidence 803(4).

Mr. Kahle hoped to compare qualifications between Ms. Hasty in the Petri case and Ms. Keefer in the case at bar. Basically, there is no comparison and the Petri Court would not have permitted Ms. Keefer to testify about alleged statements made to her.

Mr. Kahle failed to mention that in the Petri case, the defendant had filed a Motion In Limini to keep hearsay testimony from evidence at his trial. "...The Circuit Court ruled the statements of D.R. (the alleged victim) to his school teacher and principal [sic] were admissible; the statements of the victim to the police officer and the grandmother were INADMISSABLE (emphasis added).

Defense Counsel would respectfully refer this Honorable Court to Justice Starcher's concurring opinion in the Petri case where he pointed out that, "However, where there is no showing that a declarant was aware that their statement was made for the purpose of medical treatment or diagnosis, this exception is not applicable. See *Ring v. Erickson* (983 F. 2d. 818, 8 Cir. 2002), where the court held that rule 803 (4) was not applicable where a child did not even know that the interviewer was a doctor. The state introduced no such showing or representation

that the declarant was aware that her alleged statements were made for the purpose of medical treatment or diagnosis.

By permitting the calling of Ms. Keefer as a first witness, prior to the alleged victim, Rhaven M., whose testimony Ms. Keefer was going to support, the trial court allowed the jury to hear outrageous, upsetting and prejudicial allegations that Rhaven M. had allegedly told to her. The prosecutor, who had met with Rhaven M., may appear to have known that her testimony would conflict with that of Ms. Keefer as to nature and occurrence of the alleged sexual abuse and assault perpetrated upon her. In fact, the testimony of the alleged victim, Rhaven M., did conflict with the testimony of Ms. Keefer on one of the most disgusting and abhorrent allegations, that from the jury's reaction, shocked and enraged them.

For example, compare the direct examination of Ms. Keefer (trial transcript P. 40 L. 24-25 and P. 41 L. 1-14).

Q. Were there any foreign objects described to you?

A. Yes, Rhaven, when she used --- describing she would use her hand and she would hold her hand out like this (indicating) and say that there was some type of a stick that she saw them order in a magazine. The UPS man dropped it off in a box. They brought it upstairs. They got this stick out. They did not use it right away. They put it in the bottom drawer of the dresser. I asked her if it had anything on it. She said she thought it had spikes on it. I asked her, "Did it make any noise? Did it move? Did it smell? Anything?" She said she thought it moved and made a funny noise.

Q. Was this stick ever discussed as being used in sex?

A. Yes.

Now the direct examination of alleged victim, Rhaven M., with regard to this subject matter (trial transcript P. 86 L. 6-11).

Q. Okay, did mommy ever have you put anything in her that wasn't your fingers, like an object?

A. Yes, her mouth and that's all.

Q. Okay, but do you ever remember mommy having you put something else in her private area or vagina, other than your fingers and your mouth?

A. No.

Defense Counsel made several impassioned objections to the direct examination of Ms. Keefer. The trial court continually stated “that if the statements are being offered for the truth of the matter asserted, then the objection would be sustained.” However, the trial court judge never sustained the motion to stop hearsay testimony even when Mr. Kahle admitted it was indeed being introduced for the truth of the matter asserted. Instead, the trial court judge continued to address the jury, “...these questions, as I understand it, are not being offered for the truth of the matter asserted...”

THE COURT: Okay. If they’re not being offered for the truth of the matter asserted, what are (trial transcript P. 23 L. 1-25) they being offered?

MR. KAHLE: Well, they are being offered for the truth of the matter asserted (emphasis added). My fall-back position is to prove the advanced sexual knowledge of this child ---

MR. ALBERTY: Not this way. It’s hearsay.

THE COURT: And I said, if they are being offered for the truth of the matter asserted, then the objection is sustained.

MR. KAHLE: Right. And, Judge, I would like (trial transcript P. 27 L. 1-25) to offer them. And I respectfully disagree with the Court’s ruling, but I still need to get these statements in. If that’s the only way I can get them in, that’s what I’m going to have to do, Judge.

THE COURT: All right. Okay.

THE COURT: The jury will be instructed that any statements already offered with respect to this diary that were not offered for the truth of the matter asserted, they are to disregard.

MR. ALBERTY: Is the jury going to make a determination what they’re offered for? I think the Judge needs to make the determination.

THE COURT: I’m not sure why they were offered, because there was no objection. This is the first time we discussed it.

MR. ALBERTY: Well, then, I’m asking for the last question to be stricken, because I objected. I (trial transcript P. 28 L. 1-25) mean, the jury can’t be left to decide what it was offered for.

THE COURT: Okay.

MR. KAHLE: I told you, Judge. It’s being offered to show the age inappropriate sexual knowledge of a seven-year-old girl.

THE COURT: Right. And I believe you can ask it for that reason. I don’t believe that’s for the truth of the matter asserted that these things happened, that’s for another reason, and I think you can ask that.

MR. KAHLE: That's what I'm intending to do. I respectfully disagree with the Court's ruling, but I'll offer it for those purposes, sir.

THE COURT: Okay.

THE COURT: Okay. (trial transcript P. 29 L. 1-5)

THE COURT: Okay. Ladies and gentlemen, please disregard the witness's last answer. These statements regarding what's in the journal, as I understand it, are not being offered for the truth of the matter asserted within the statements. You may proceed. (trial transcript P. 32 L. 1-22)

MR. ALBERTY: I would just renew my objection and ask that the jury be re-reminded.

THE COURT: Yes, I just reminded them with this line of questions and I'll give you a continuing objection. You may proceed. (trial transcript P. 35 L. 2-25)

MR. ALBERTY: But that part of her answer has to be stricken. She has to be told to stop saying that. We'll stipulate this child has a sexual knowledge. We told the jury --- you should tell the jury this child has a sexual knowledge past what should be her age and you can dismiss this witness, and then this whole thing should be stricken. Obviously, this is purely for the truth. This has nothing to do with sex, fighting and clawing. It has nothing to do with her knowledge. It's describing a vivid rape scene for the truth of the assertion.

THE COURT: Okay. Response?

MR. KAHLE: Judge, this is, number one, a statement against --- clearly against this girl's interest. She wanted to go --- she wanted to go home and --- with her mommy. Making ---

MR. ALBERTY: Wait a minute. There's been no evidence of this. What is he talking about? I mean, where ---

THE COURT: Mike, please let him finish. You've just got to let him finish so I can make a ruling and we can keep this thing moving.

MR. KAHLE: Again, it was taken --- she was taking these notes down for purposes --- and she's --- (trial transcript P. 36 L. 1-25) gives this on to her therapist. And Judge, it's being offered not for the truth of the matter asserted, but to --- she's going to describe in explicit detail being held over, bent over, and anal intercourse going on here. A seven-year-old child.

MR. ALBERTY: May I speak?

THE COURT: YES.

MR. ALBERTY: Now he's saying it's offered for the detail. The detail means the truth of the thing being said. We've completely abandoned his unwanted position. It was to show sexual knowledge. We'll stipulate to that. We can end this.

THE COURT: Okay. Consistent with the Court's prior rulings, I will instruct the jury again, for the third time now, these statements are not being offered for the truth of the matter asserted, but I'll take it further this time and say but they're being offered to demonstrate a knowledge of sexual --- or being offered to demonstrate a sexual knowledge.

THE COURT: Okay, Ladies and gentlemen, again, these statements are not being offered for the truth of the matter asserted. As I understand it, they are being offered to demonstrate sexual knowledge possessed by Rhaven.

The trial court judge made a ruling as to the order of the State's witnesses Keefer (1st), Rhaven M., the alleged victim (2nd), but never enforced or followed up on his ruling. (trial transcript P. 21 L. 23-25).

COURT: Okay, all right. Here's --- this is going to be the ruling. We could handle this one of two ways. We can defer and you can recall her. (trial transcript P. 22 L. 1-5). After Rhaven testifies with respect to these statements that she made and recorded. But if the statements are being offered for the truth of the matter asserted, then the objection would be sustained. If they're not being offered for the truth ---

The arguments by counsel over the questions of the hearsay evidence continued and the trial court failed to follow through on its ruling regarding the order of the State's witnesses. The fall back positions articulated by Prosecutor Kahle do not fit any of the exceptions for hearsay testimony as set forth in the West Virginia Rules of Evidence which states as follows:

If the trial court judge was admitting the hearsay testimony under 804 (5), the Court would be required to determine that the hearsay testimony has equivalent circumstantial guarantees of trustworthiness and make the following findings (1) the statement is offered as evidence of a material fact (2) the statement is more probative on point for which it is offered than any other evidence which the proponent can procure through reasonable efforts and (3) the general purposes of the rules and the interest of justice will best be served by the admission of the statement into evidence.

In the case at bar, the trial court made no such findings but rather failed to grant the many continuing objections of the defense counsel as long as Prosecutor Kahle stated that he had fall-back positions. None of Prosecutor Kahle's fall back positions meet the exceptions set forth in

the Hearsay Rules. Defense Counsel cannot find any West Virginia or Federal Case Law that recognizes “fall-back positions” as an exception to the Hearsay Rule.

Defense counsel is aware of the great discretion given to the trial court judge in ruling on the admissibility of evidence. Defense counsel recognizes that the trial court judge must make immediate decisions without the fear of being reversed by an appeal court. The case at bar, the ability of a “curative” instruction to “un-ring the bell” is uncertain at best.

The trial court judge did an admirable job in attempting to explain to the jury that Ms. Keefer’s testimonial statements (as outlined above) were not being offered for the truth of the matter asserted. Several times the trial court gave that curative instruction to the jury.

Curative instructions must be understandable by a lay jury. Defense counsel believes that the number of the same instruction and the continued testimonial statements of Ms. Keefer only confused the jury. Defense counsel believes that if the members of the jury had been asked to explain the meaning of, “statements are not being offered for the truth of the matter asserted,” not one would be able to do so. The jury only knew that these hearsay statements regarding what the alleged victim, Rhaven M., said to Ms. Keefer were continuing to be made and that the judge did not stop them. The bell was indeed rung and the jury tainted to the point that they could not reach an impartial decision, making it impossible for the defendant to receive a fair and impartial trial. As the instant case illustrates, the ability of a “curative instruction” to un-ring the bell” is uncertain at best.

Judge Learned Hand once said that an instruction to the jury to ignore an objectionable piece of testimony is the “recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody’s else.” *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932). Where an instruction to a jury to disregard an improper argument is ineffective, a mistrial is an appropriate remedy. See *State v. Gwinn*, 169 W.Va. 456, 471, 288 S.E.2d 533, 542 (1982); *State v. Bennett*, 179 W.Va. 464, 473, 370 S.E.2d 120, 129 (1988). *fn3

Prosecutor Kahle made other misinformed statements to the court in addition to his fall-back positions,” such as, that the trial court could admit hearsay evidence on “his word as an officer of the court.” However, he failed to advise the trial court that if any of his representations were correct; they still would not meet the law of the land regarding hearsay testimony and protection of the Sixth Amendment Right to be confronted with the witness against him.

On March 8, 2004, the United States Supreme Court handed down its decision in *Michael D. Crawford, Petitioner, v. Washington* (123 S. CT., 1354, 541 U.S. 36, 158 L. Ed. 2d, 177(03/08/2004)). This decision reversed all previous decisions and wrote new law for all state and federal courts.

The U.S. Supreme Court granted Certiorari to determine whether the State’s use of Sylvia’s, (the wife’s) statement violated the Confrontation Clause.

The Sixth Amendment’s Confrontation Clause provides that, “[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him.” We have held that this bedrock procedural guarantee applies to both federal and state prosecutions. *Pointer v. Texas*, 380 U.S. 400, 406 (1965). The Roberts’ case says that an unavailable witness’s out-of-court statement may be admitted so long as it has adequate indicia of reliability --- i.e., falls within a “firmly rooted hearsay exception” or bears “particularized guarantees of trustworthiness:” 448 U.S., at 66. Petitioner argues that this test strays from the original meaning of the Confrontation Clause and urges us to reconsider it.

The Constitution’s text does not alone resolve this case. One could plausibly read “witnesses against” a defendant to mean those who actually testify at trial, *see 3 J. Wigmore, Evidence 1397, p. 104 (2d ed. 1023)* (hereinafter Wigmore), or something in-between, see *infra*,

at 15-16. We must therefore turn to the historical background of the Clause to understand its meaning.

The text of the Confrontation Clause reflects this focus. It applies to “witnesses” against the accused --- in other words, those who “bear testimony.” 1 N. Webster, *An American Dictionary of the English Language* (1828). “Testimony,” in turn, is typically “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Ibid.* An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

Various formulations of this core class of “testimonial” statements exist: “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 Petitioner 23; “extra-judicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,” *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas J., joined by Scalia, J., concurring in part and concurring in judgment); “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,” Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae 3. These formulations all share a common nucleus and then define the Clause’s coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition --- for example, ex parte testimony at a preliminary hearing.

The historical record also supports the proposition that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. The test of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the “right ... to be confronted with the witnesses against him: Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding. See *Mattox v. United States*, 156 U.S: 237, 243 (1895); cf. *Houser*, 26 Mo., at 433-435.

The legacy of Roberts in other courts vindicates the Framers’ wisdom in rejecting a general reliability exception. The framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations.

The unpardonable vice of the Roberts test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude. Despite the plurality’s speculation in *Lilly*, 527 U.S., at 137, that it was “highly unlikely” that accomplice confessions implicating the accused could survive Roberts, courts continue routinely to admit them.

To add insult to injury, some of the courts that admit untested testimonial statements find reliability in the very factors that make the statements testimonial. As noted earlier, one court relied on the fact that the witness’ statement was made to police while in custody on pending charges --- the theory being that this made the statement more clearly against penal interest and thus more reliable. *Nowlin, supra, at 335-335, 579 S.E. 2d, at 371-372*. Other courts routinely rely on the fact that a prior statement is given oath in judicial proceedings. E.g., *Callego, supra*,

at 178 (plea allocution); Papajohn, *supra*, at 1130 (grand jury testimony). That inculpatory statements are given in a testimonial setting is not an antidote to the confrontation problem, but rather the trigger that makes the Clause's demands most urgent. It is not enough to point out that most of the usual safeguards of the adversary process attend the statement, when the single safeguard missing is the one the Confrontation Clause demands.

Where non-testimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law – as does Roberts and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross examination.

We leave for another day any effort to spell out a comprehensive definition of “testimonial.”

*fn10 Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which Confrontation Clause was directed.

The U.S. Supreme Court then issued the following ruling:

“In this case, the State admitted Sylvia’s testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment. Roberts notwithstanding, we decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”

The judgment of the Washington Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion. It is so ordered.”

Therefore, at the minimum, the trial court had to make a finding as to whether the statements of the declarant were “testimonial” or “non-testimonial.” If the declarant, the alleged

victim, Rhaven M., did not know and/or intend that her statements were for the use of investigation and/or prosecution, then they cannot be admitted. The record is devoid of any such evidence because the state failed to inquire either of Ms. Keefer or the alleged victim, Rhaven M., as to what purpose the statements of Rhaven M. were made.

In a very recent decision, an appeal case (less than six [6] weeks prior to the case at bar, heard before the U. S. District Court of Appeals for the Fourth Circuit, *Donald Allison Blount, Jr., Petitioner – Appellant, v. James Hardy, Respondent – Appellee, and Roy Cooper; Theodis Beck, Respondents (No 08-6366 4th Cir 07/09/2004)*, this case parallels the case at bar including the introduction of a child's statements regarding sexual assault and abuse to other people and the admissibility of those statements.

Defendant Donald Allison Blount, Jr., a North Carolina inmate appealed the dismissal of his petition for a writ of habeas corpus. Mr. Blount stood convicted of first degree rape of a child, first degree sexual offense, and taking indecent liberties with a child. He was sentenced to a range of 333 to 413 months imprisonment. The Fourth Circuit Court of Appeals granted a Certificate of Appealability (COA) to determine whether the state trial's court admission of out-of-court statements made by a child victim to therapists violates the Sixth Amendment right to confront witnesses. The decision of the state court was affirmed.

At the trial "S.F." was called as a witness but was unable to respond in any meaningful way to the questions posed to her. The trial court determined that she was unavailable as a witness. The therapists were called to the stand and testified as to what S.F. had told them.

Blount argued that permitting the therapists to testify as to what S.F. told them was a violation of his Sixth Amendment Right of Confrontation. The North Carolina Supreme Court

noted that, “following Crawford, the determinative question with respect to confrontation analysis is whether the challenged hearsay statement is testimonial.” The Court of Appeals further observed that “the United States Supreme Court determined in Crawford that “at a minimum” the term testimonial applies to “prior testimony at a preliminary hearing, before a Grand Jury or at a former trial and to police interrogations. Finally, the North Carolina Court of Appeals stated “North Carolina has recognized in Crawford an additional prong necessary to show whether a statement is testimonial. This additional prong of analysis for determining whether a statement is “testimonial” is considering and surrounding the circumstances whether a reasonable person in the declarant’s position would know or should have known his or her statements would be used at a subsequent trial. The determination is to be measured by an objective, not subjective standard.

The North Carolina Court of Appeals wrote as follows:

“...In light of the fact that the young victim in the instant case was speaking with therapists, not police officers, and the record is devoid of any evidence that she had the slightest inkling that the defendant faced criminal charges, or even if she knew what criminal charges are ... we hold her statements were not testimonial for Confrontation Clause purposes.”

The trial court abused its discretion by admitting Ms. Keefer’s hearsay testimony without making a finding as to whether the declarant, alleged victim, Rhaven M., was testimonial or non-testimonial.

The evidence in the case at bar is quite clear that the witness, Sally Keefer, testified that she was employed by the West Virginia Department of Health and Human Resources and was keeping a lot of Rhaven M.’s statements for the purposes of reporting them to agents of the state acting under the auspices of the Ohio County Police agencies and Prosecutor’s Office. R. M.’s

statements were in response to the interrogation by the state's agent, Sally Keefer and, therefore, are testimonial and subject to the Sixth Amendment Confrontation Clause.

Prosecutor Kahle gave the trial judge his word, "as an officer of the court" that he would ask the same questions asked of Sally Keefer, of the victim, Rhaven M., when she was called to testify.

Mr. Kahle may have unintentionally misled the court, because he knew that his associate, Prosecutor Wood, was going to conduct the examination of Rhaven M. Furthermore, the prosecutors had already prepped Rhaven M. and knew, or should have known, that her testimony would contradict that of Sally Keefer and would avoid asking the same questions. When Defense Counsel attempted to inquire of Rhaven M. what she actually told Ms. Keefer, the trial judge stopped him and instructed him to inquire only to testimony brought out in direct examination (T.T. P. 92 L. 15-19) Therefore, the defendant was denied her Sixth Amendment Confrontation rights and the hearsay evidence was improperly and unconstitutionally admitted as evidence.

Syllabus 6, of the Mechling case recites as follows:

"6. Pursuant to Crawford v. Washington, 541 U.S. 36 (2004), the Confrontation Clause contained within the sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution bars the admission of a testimonial statement by a witness who does not appear at trial, unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness."

The United States Supreme court decision in Crawford has required this honorable Court to modify its holding in three (3) previous decisions. This Honorable Court explained as follows:

"...The central holding of Crawford is that the testimonial character of a witness's statement separates it from other hearsay statements, and determines whether the statement is admissible at

trial or not because of the Confrontation Clause. The Confrontation Clause is a rule of procedure, not a rule of evidence". "If there is one theme that emerges from Crawford, it is that the Confrontation Clause confers a powerful and fundamental right that is no longer subsumed by the evidentiary rules governing the admission of hearsay statements".

The circuit court's November 19, 2004 judgment order is reversed and the case is remanded for further proceedings.

I respectfully refer this court to footnote 10 of the Mechling case, which states as follows:

***fn10 In footnotes 1 and 2 of Davis, the U. S. Supreme Court indicated that its opinion was focused upon "interrogations" by law enforcement officers, and thus it was "unnecessary to consider whether and when statements made to someone other than law enforcement personnel are 'testimonial.'" 547 U.S. at ____ - ____ n. 1 and n. 2 (Slip Op at 708 n.1 and n.2). However, in Davis, the Court cited as authority decisions suggesting that statements made to non-law-enforcement individuals may be testimonial and also be subject to Confrontation Clause limitations. See 547 U.S. at ____ (slip Op. at 13) (citing King v. Brasier, 1 Leach 199, 179 Eng. Rep. 202 (1779) (wherein a "young rape victim, 'immediately on her coming home, told all the circumstances of the injury' to her mother... the case could be helpful to Davis if the relevant statement had been the girl's screams for aid as she was being chased by her assailant. By the time the victim got home, her story was an account of past events.")). Furthermore, the Court said that readers should not infer from the opinion that 'statements made in the absence of any interrogation are necessarily non-testimonial.' 547 U.S. at ____ n.1 (Slip Op, at 7 n.1).**

Until the U.S. Supreme Court holds otherwise, we interpret the Court's remarks to imply that statements made to someone other than law enforcement personnel may also be properly characterized as testimonial.

It should be noted that Sally Keefer was and is an employee of the State of West Virginia and her questioning of Rhaven M. was for the purpose of furthering a criminal investigation. An agent of law enforcement is as constrained by the U. S. Constitution and the West Virginia Constitution as police officers themselves.

Defense Counsel would like to emphasize Syllabus No. 2 of the Mechling case, which states as follows:

"2. Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless *beyond a reasonable doubt* (emphasis added)". Furthermore, the beneficiary of this constitutional error, the State, must establish beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

This is impossible for the State to do since the jury returned a guilty verdict on all counts given to them for deliberation. The guilty verdicts on certain counts were based solely on the hearsay testimony of Sally Keefer because the state produced no other evidence to support such a verdict, not even from the alleged victim, Rhaven M.

SECOND ERROR

The trial Court abused its discretion and created plain error when it sustained the State's objection to Defense Counsel's questioning of Rhaven M. as to other persons that she had made false allegations against for sexual assault and sexual abuse. The State's objection was made and sustained by the trial court judge under the West Virginia Rape Shield law. The trial court prohibited Defense counsel from soliciting testimony and introducing evidence as to the falsity of Rhaven M.'s other accusations of sexual assault and abuse against different people including family members, as well as, vivid dreams of police handcuffing and sexually assaulting her.

(trial transcript P. 87, L. 15-25).

CROSS-EXAMINATION

BY MR. ALBERTY:

Q. How many different men did you have sex with?

MS. WOOD: Your Honor, may we approach?

THE COURT: Yes.

(Whereupon, Counsel and Defendant approached the bench and a discussion ensued.)

MS. WOOD: This violated – violates the Rape Shield Statute. There's no – I mean, if he's – there's no reason to ask this question of this child, and to ask it about men – or how many she had sex with. There's no evidence in this case that she has had sexual relations with anyone. Certainly not consensual. Or whether she's been perpetrated by anyone else other than her mother. It's not admissible. If there's no claimed injury for which there has to be identification or a disease or such – I mean, it is what it is, Your Honor.

MR. ALBERTY: Your Honor, this child, according to the records the prosecutor's office (trial transcript P. 91 L. 1-25) provided to me, has named numerous individuals that had sex with – that raped her.

MS. WOOD: Your Honor, that's misrepresenting the evidence.

Assistant Prosecutor, Ms. Wood, was in error when she argued to the trial court that “There is no evidence in this case that she (alleged victim, Rhaven M.) had sexual relations with anyone.

I respectfully direct this Honorable Court to the FINDINGS OF FACT AND CONCLUSION OF LAW in the abuse and neglect proceedings dated July 10, 2007, wherein Judge Mazzone made finding number 44, at page 11, Line 16, quoting alleged victim, Rhaven M.: “Everything that he did (Jack Jones) ... David Burch did, but Jack did it a lot more ... Mommy was dating David, mommy used to date all of Jack’s friends and sometimes they would all get together and have sex together while we were there.”

I respectfully direct this Honorable Court to the Ohio County Sheriff’s report dated March 6, 2003, by Deputy J. Cuchta, Lt. of record and identified by complaint number 03-01765.A013 under “People entry Detail” which lists alleged victim, Rhaven M.’s uncle, Calip Morris, whose birth date is 10/07/76 as a suspect in her sexual assault.

I respectfully direct this Honorable Court to the voluntary statement of record by Robin Louise Dierkes given to Officer Griffith with the Wheeling Police Department who was conducting an investigation into the alleged sexual assault of Rhaven M. dated March 5, 2003, wherein Ms. Dierkes states that the alleged victim, Rhaven M., told her that “Jack Jones had touched her (Rhaven M.) while Jessica was at work.”

I respectfully direct this Honorable Court to the Ohio County Sheriff’s Office report dated April 21, 2003, and of record, regarding Complaint Number 03-01765.C013, wherein Deputy J. Cuchta, Lt., documents Jack Jones’ statement that, “...during the summer of 2001,

Rhaven reported to him that a five year old named Chuckie wanted to have sexual relations with her.”

I respectfully direct this Honorable Court to the notes of Sally Keefer e-mailed to Michelle Hogan with a subject title of “Sally Notes” of record, in response to a question by Sally Keefer, “Where was mommy when this was going on? She (Rhaven M.) said, “Mommy was at the neighbor’s house.” Further in the same notes, I (Keefer) asked her, “Did anyone else ever touch your privates?” She (Rhaven M.) said, “Yes, David Burch did, but Jack did it a lot more.”

I respectfully direct this Honorable Court to the September 15, 2007 letter of record from Sara Wyer, M. A. of the SAAR Psychological Group addressed to Jenna P. Wood, Assistant Prosecuting Attorney, on page 2, bottom of second paragraph, “While mother was not always present during the sexual abuse instances that occurred with Jack, on many occasions, mother was present and it appears as if she even directly participated in the sexual abuse.”

Defense counsel had the right and duty to explore the statements and facts set forth above and others through cross-examination of the alleged victim, Rhaven M.

MS. WOOD: Oh, my. This has nothing to do with competency. It has to do with the truthful answers. She’s nine.

THE COURT: The objection is going to be sustained. You may inquire as to whatever conduct of a sexual nature she described in her direct testimony.

MS. WOOD: Thank you.

MR. ALBERTY: I can’t go into her grandfather, her uncle, any of those people?

MS. WOOD: Your Honor, the scope of direct.

THE COURT: You can – the sexual acts that she testified on direct.

MR. ALBERTY: Well, then, I would ask at the end of direct, this child be kept subject to recall by (trial transcript P. 92 L. 1-25) myself. I can’t subpoena her. I don’t know where they have her. It’s grossly unfair and I’d ask to –

MS. WOOD: Your Honor, he could list her – could have subpoenaed her. He told the jury that he didn't have access to her. That's not – never made the request, never asked to interview her.

MR. ALBERTY: Because –

MS. WOOD: Subpoenaed her through the Department.

THE COURT: Under these procedural circumstances, now is the time to ask your questions of this witness.

MR. ALBERTY: Judge, my questions are limited to virtually nothing.

THE COURT: You're limited to the areas that were brought up on direct examination. I'm not denying you anything. The Rules permit you to inquire regarding the topics brought up on direct examination. I'm not denying you that opportunity.

MR. ALBERTY: Okay. Then I'm going to ask that she be kept available for my case tomorrow.

MS. WOOD: She's not available, Your Honor.

THE COURT: Okay. Let's go.

Defense Counsel believes that the trial judge's ruling that Rape Shield prevented him from questioning the witness, alleged victim, Rhaven M., regarding her apparent false accusations of rape against other family members and acquaintances was a clear abuse of discretion. The trial court judge failed to follow the test set forth by this Honorable Court in *State of West Virginia, Plaintiff Below, Appelle v. Roger Paul Parsons, Defendant Below, Appellant* (214 W.Va. 342, 589, S.E. 2d 226, 2003.) and made no such findings, which is a clear abuse of discretion. The test set forth in that case is as follows:

The Court has described the decisions a judge must make when excluding evidence under our rape shield statute. (Emphasis added)

The test used to determine whether a trial court's exclusion of proffered evidence under our rape shield law violated a defendant's due process right to a fair trial is (1) whether that testimony was relevant; (2) whether the probative value of the evidence outweighed its prejudicial effect; and (3) whether the State's compelling interests in excluding the evidence outweighed the defendant's right to present relevant evidence supportive of his or her defense. Under this test, we will reverse a trial court's ruling only if there has been a clear abuse of discretion.

The trial court refused to hear any evidence that the defense wanted to proffer and, therefore, refused to make any findings as to whether (1) the testimony was relevant, (2) whether the probative value of the evidence outweighed its prejudicial effect and (3) whether the evidence outweighed the defendant's right to present relevant evidence supportive of her defense. The trial court clearly abused its discretion and the defendant was denied a fair trial.

The trial court abused its discretion by refusing to hear evidence, even in camera, that there was a strong possibility that the alleged victim of the sexual offense has made false statements of sexual misconduct; evidence relating to those statements may be considered by the Court outside the scope of the rape shield. Please refer to *State v. Quinn* (200 W.Va. 432, 490 S.E. 2d 34.)

In the case of *State v. Guthre* (205W.Va. 326, 518 S.E. 2d 83). This Honorable Court held that:

"...[r]ule 404(a)(3) of the West Virginia Rules of Evidence provides an express exception to the general exclusion of evidence coming within the scope of our rape shield statute. This exception provides for the admission of prior sexual conduct of a rape victim when the trial court determines in camera that evidence is (1) specifically related to the act or acts for which the defendant is charged and (2) necessary to prevent manifest injustice..."

"...A defendant seeking to introduce evidence of a victim's sexual history must offer an evidentiary proffer which affords that trial court a meaningful opportunity to balance the interests of the state, as embodied in the rape shield statute, against the interests of the defendant. "The good faith basis does not have to be admissible evidence, but it must be something that persuades the trial judge the question is proper, such as an affidavit, a reliable record, or a potential live witness." Cleckley's Handbook on Evidence for West Virginia Lawyers 6-8(B)(2)(c)(4th Ed. 2000). A proffer requiring the court to speculate is insufficient. See *Quinn v. Haynes*, 234 F. 3d 837, 850 (4th cir. 2000)(stating that West Virginia's rejection of simple denial testimony as proof of falsity is not arbitrary or disproportionate to the interests the rape shield law was designed to serve)..."

The trial court abused its discretion and created plain error by denying the defendant a fair trial when the defense was denied the opportunity to proffer evidence that would have provided the trial court a meaningful opportunity to balance the interest of the state against the interests of the defendant.

This Honorable court re-iterated and referred to this procedure in *State of West Virginia, Plaintiff Below, Appellee, v. Joshua C. Wears, Defendant Below, Appellant* (665 S.E. 2d 273, 222 W.Va. 439 (2008)).

The trial court judge's abuse of discretion clearly violated the defendant's Six Amendment Rights. Defense Counsel respectfully refers this Honorable Court to *fn16 of the *State of West Virginia, Plaintiff Below, Appellee v. Joshua C. Wears, Defendant Below, Appellant* (665 S.E. 2d 273, 222 W.Va. 439 (2008)), which recites as follows:

***fn16** Although not at issue in this case, as our decision here rests upon the inadequacy of Appellant's proffer, we observe that a review of West Virginia Rule of Evidence 404(a)(3) may be appropriate with respect to the issue of an accused's Sixth Amendment confrontation rights in rape shield cases. If the appropriate case presents itself in the future, we may wish to consider whether such rule as applied ensures in rape shield cases a hearing to balance the accused's Sixth Amendment rights with the State's interests in protecting sexual abuse victims in accordance with the Rock-Lucas principles enunciated by the U.S. Supreme Court. See *Barbe v. McBride*, 521 F.3d 443 (4th Cir. 2008)(holding that the Rock-Lucas principle requires that a state court, in ruling on the admissibility of evidence under a rape shield law, must eschew the application of any per se rule in favor or a case-by-case assessment of whether the relevant exclusionary rule 'is arbitrary or disproportionate' to the State's legitimate interests.) Because the proffer herein was inadequate, the trial court was unable to even conduct the balancing test enunciated in *State v. Guthrie*, 205 W.Va. 326, 518 S.E.2d 83, despite the trial court providing Appellant ample opportunity for a sufficient proffer.

This case is very similar to the case of *Donald R. Barbe, Petitioner – Appellant v. Thomas McBride, Warden, Mount Olive Complex, Respondent-Appellees* (521, F. 3d 444 4th Cir. 04/07/2008). During the Donald Barbe original trial, defense counsel, M. C. Alberty, attempted to introduce evidence that so such assault had taken place. The trial court refused to

allow the evidence to be admitted and precluded the defense from examining the state's witnesses, under the West Virginia Rape Shield Law.

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

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

"...His Sixth Amendment confrontation right was undisputedly contravened, however, by the state circuit court's application of a per se rule restricting cross-examination of the prosecutor's expert under the state rape shield law – a ruling in conflict with what we term "Rock-Lucas Principle" established by the U.S. Supreme Court. See *Michigan v. Lucas* (500 U.S. 145, 151 (1991) (recognizing that, rather than adopting a per se rule for precluding evidence under rape shield statute, state courts must determine, (emphasis added) on a case-by-case basis, whether exclusionary rule "is arbitrary or disproportionate to the State's legitimate interests" (quoting *Rock v. Arkansas* (483 U.S. 44, 56 (1987)). Because the circuit court's Sixth Amendment error had a substantial and injurious effect on the jury's verdict as to the offenses involving J.M., we are constrained to deem him entitled to some habeas corpus relief..."

"...For the reasons that follow, we conclude that the State Court Decision involves an objectively unreasonable application of federal law, in that the state circuit court either "correctly identifie[d] the governing legal rule" –i.e., the Rock-Lucas Principle –"but applied it unreasonably to the facts", or was "unreasonable in refusing to extend the governing legal principal to a context in which it should have controlled." Conway, 453 F. 3d at 581 (internal quote marks omitted). Because of the sparse and crytic nature of the circuit court's explanation for its denial of the Habeas Corpus relief, we are uncertain if the circuit failed to assess whether the rape shield was arbitrary or disproportionate to the State's legitimate interest in the circumstances of the Barbe case. Indeed, the court failed to identify or discuss a single state or federal authority (including Rock or Lucas) with particular respect to Barbe's contention that the Rape Shield ruling contravened his Sixth Amendment confrontation right. In any event, either of these alternative bases for the State Court Decision amounts to objectively unreasonable application of federal law.

"...We now reiterate that the Rock-Lucas principle constitutes clearly established federal law determined by the Supreme Court of the United States. The Rock-Lucas principal clearly mandates that a state court, in ruling on admissibility of evidence under a rape shield law, must eschew the application of any per se rule in favor of a case by case assessment of whether the relevant exclusionary rule is "arbitrary or disproportionate to t6he state's legal interest". *Lucas*, 500 U.S. at 151 (quoting *Rock* 483 U.S. at 56) ."

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

“... we premise our conclusion on several relevant factors that a court should consider in conducting a Rock-Lucas assessment: (1) the strength of the vel non of the state’s interest that weigh against admission of the excluded evidence, see *Chamber v. Mississippi*, (440 U. S. 284, 295, (1973)); (2) the importance of the excluded evidence to the presentation of an effective defense, see *Davis v. Alaska*(415 U. S. 308, 319, (1974) and (3) the scope of the evidence ban being applied against the accused, see *Delaware v. Van Arsdall* (475 U. S. 673, 678-679 (1986). These factors derived from Supreme Court precedent for the purposes of the Rock-Lucas principle in the *First Circuit While Decision*. See *White* (399 F. at 24)

THIRD ERROR

The trial court abused its discretion and created plain error when it prohibited Defense Counsel from questioning Rhaven M. (victim) regarding certain facts that would demonstrate her inability to testify as a competent witness. The trial judge erred when he ruled that Defense Counsel failed to raise the question of competency of Rhaven M. to testify. The trial court accepted the representation of Prosecutor Wood that no such inquiry or motion had been filed and the trial court compounded the error by determining that such motion had not been filed. The prosecutor misinformed the court and the trial judge simply forgot that such a motion was filed and in fact was the subject of more than one pre-trial conference. The trial court judge entered an Order dated April 10, 2008, denying defense counsel's motion but stated that all exceptions and objections are noted and preserved.

I respectfully direct this court to the following question of Mr. Alberty and the answer of the alleged victim, Rhaven M. (trial transcript P. 89 L. 22-25) "...Now, before, you told somebody that mommy never did these things; do you remember that?"

A. "No. I was there and she done that to me. I know."

I would respectfully refer this Honorable Court to State's Exhibit No. 5, a letter addressed to Michelle Hogan, Ohio County C.P.S., P. O. Box 6165, Wheeling, WV 26003 from Joan Phillips, M.D., Child Advocacy Center at Women and Children's Hospital, Charleston, WV 25362, and particularly the following language, "...In summary, (redacted verbage) though she did not give us any direct statements of sexual abuse, the physical exam is abnormal" and on the last page of the report, "...When asked about other touches on her body besides getting spanked or hit on her butt, she (alleged victim, Rhaven M.) denied that any kids or grown-ups had even

given her touches on her coochie or her butt. Further inquiry into this area of discussion remained constant; she denied any touches in nature. “When asked what she could do if anyone ever did give her touches like we discussed, she said nothing. She then said, “I could tell mama...”

It should be noted that in all the mental health service providers and facilities that the alleged victim, Rhaven M., received for diagnosis, treatment and rendered report regarding Rhaven M.’s history of sexual abuse, mental condition and recommended treatment, do not address Rhaven M.’s competency to testify in court. Furthermore, it would appear from the record, that the State never inquired of any of its experts as to their professional opinion as to the victim’s competency to testify.

In the defense motion, “Motion for in-camera Hearing of State’s Witness R.M. (Rhaven M.) and any other minor child that the state intends to call at trial or use their statements,” based its motion largely on the case of *State of West Virginia v. Robert Eugene Ayers* (369 S.E. 2d 22, 179 W.Va. 365 (April 1, 1988)).

“...The main issue on the Ayer’s appeal was the allegation that the victim had recanted her allegations against him on various occasions and to various people, therefore, believes she was not competent or credible to be the prime accuser. The defendant requested that the trial court order an additional psychiatric evaluation. Prior to the trial the motion was reviewed and an in-camera hearing was conducted. The trial court judge rules that H. was competent to testify, without resorting to an additional psychiatric evaluation...”

“...The Court went on to discuss that, ‘as noted in *Burdette* the competency of infants may be challenged on two different levels. The first, more traditional, challenge concerns the child’s ability to perceive the distinction between truth and falsity, as well as the consequences of falsely testifying under oath, *Syl pt.1, State v. Jones, W.Va., 362 S.E. 2d 330 (1987); Burdette v. Lobban, W.Va. 323, S.E. 2d 601, 602, 603, note 1 (1984); State v. Watson, 318 S. E. 2d 603 (1984)*’. The second challenge, approved in *Burdette*, concerns whether the child, due to various psychological factors, is so inherently incredible as to require an additional psychiatric evaluation prior to determining competency is within the judge’s discretion...”

“...The Court continued to discuss as follows, ‘Often a child in an abuse proceeding is the only potential witness. Thus, the problem confronting any court at the outset of an abuse

proceeding is whether the child is competent and credibility are separate. These distinctions become blurred in the case of a five year old, however. In some situations a child may be engaging in fantasy. For example, the child may desire to “hurt” the parent for a real or imagined grievance. In other cases, the child may be incapable of making rational judgments on his own without being unduly influenced by others. In the sound discretion of the *trial court, a finding must be made, as to the ability of the child to testify in a competent and credible manner.*”

The trial judge stated in his order denying Defense Motion as follows, “...In this motion, the defendant seeks an in-camera hearing in the presence of the defendant. As the case law cited above indicates, this is not the appropriate relief in cases where the competency of the witness is in question or has been appropriately challenged by sufficient facts / evidence from the record...”

The trial court judge may have been correct in that he had discretion as to whether psychological testing of the infant witness was necessary. However, the judge must hold an in-camera hearing and make a finding as to the competency of a witness.

However, in the case of the *State of West Virginia v. Elmer Stacy* (371 S.E. 2d 614, 179 W.Va., July 18, 1988), this Honorable Court reversed the conviction of Elmer Stacy, stated as follows:

“...Before the child’s testimony, the court conducted an in camera competency hearing. The court and both attorneys asked the child questions to gauge her intelligence, her ability to remember and relate facts, and her understanding of the necessity to tell the truth. The defendant’s counsel argued that the child should be interviewed by an independent psychiatrist or psychologist to make a determination of the child’s competency before allowing her to testify in accordance with our decision in *Burdette v. Lobban*, 174 W.Va. 120, 323 S.E.2d 601 (1984). The trial Judge overruled the defendant’s motion and allowed the child to take the stand. Defendant reviewed his *Burdette* challenge in a motion to set aside the jury verdict, which motion was denied...”

“...On appeal, defendant assigns as error the court’s ruling on the victim’s competence to testify, citing *Burdette*. We find merit to this assignment *fn2 and reverse...”

The trial court Judge’s complete questioning of the child witness as the prime accuser was as follows: (trial transcript P. 79 L. 8-25)

THE COURT: Come on in Rhaven. Okay. Have a seat in that big chair there (indicating). Okay. Rhaven, how are you doing, kiddo?

THE WITNESS: Good.

THE COURT: All right? Okay. Rhaven, in a second here, we're going to bring the jury in. Okay? They're all nice people. All right?

THE WITNESS: Okay.

THE COURT: Now, Rhaven, do you understand here that today the nice lady seated to my right (indicating) is going to place you under oath. Okay? Do you know what that means?

THE WITNESS: No.

THE COURT: What does that mean?

THE WITNESS: I don't know.

THE COURT: Do you – when you're placed under oath that means you have to tell the truth. Do (trial transcript P 80. L. 1-16) you understand that?

THE WITNESS: Yes.

THE COURT: Okay. Do you know the difference between telling the truth or telling a lie or a fib?

THE WITNESS: Yeah.

THE COURT: Okay. And you know today you have to tell the truth?

THE WITNESS: Yes.

THE COURT: All right. Okay. Do you agree to do that?

THE WITNESS: Yes.

THE COURT: And you understand what that means?

THE WITNESS: Yes.

THE COURT: Okay.

The trial court judge abused his discretion by permitting the alleged victim and prime accuser to proceed to testify without making a finding that she was a competent and credible witness.

Therefore, the conviction of Jessica Jane Morris must be reversed and remanded back to the trial court for a new trial.

FOURTH ERROR

The trial court judge abused his discretion and created plain error when he denied the defense motion to disqualify the Ohio County Prosecutor's Office from prosecuting the criminal case against the Defendant, Jessica Jane Morris.

On January 24, 2008, Defense Counsel filed a motion entitled, "Motion to Disqualify and / or Recuse the Ohio County Prosecutor's Office from the Jessica Jane Morris Criminal Case.

On January 30, 2008, Assistant Prosecuting Attorney Gail W. Khale filed the "State's Response to Defendants Motion to Disqualify and / or recuse the Ohio County Prosecutor's Office from the Jessica Jane Morris."

On January 31, 2008, Defense Counsel filed a "Memorandum in Support of Defendant's Motion to Disqualify and / or recuse the Ohio County Prosecutor's Office from the Jessica Jane Morris Criminal Case.

After reviewing the pertinent case law, Defense Counsel does not understand why the Ohio County Prosecutor's Office did not recuse itself before it laid the legal mechanical framework of indicting Jessica Jane Morris. The appearance of impropriety is so great and the case law is so clear regarding a prosecutor's quasi judicial responsibility and absolute duty to avoid "**any appearance of impropriety**", that one wonders why Assistant Prosecutor Khale is claiming that Defense Counsel's Motion is "frivolous" instead of withdrawing and asking that a Special Prosecutor be appointed. Defense Counsel has a responsibility to the Court to disclose problems that may lead to cause plain error in the trial of the case at bar.

The West Virginia Supreme Court of Appeals and other appellate courts have spoken often about the disqualification of prosecutors. Defendant Jessica Jane Morris respectfully asks this Honorable Court to consider the following case law.

In *United States of America v. Robert Barnwell Clarkson*, 567 F. 2d. 270 (4th Cir. 12/15/1977), the Fourth Circuit Court of Appeals upheld the conviction of the defendant for the crime of contempt of court. The court upheld the trial court. However, in the court's discussion and finding in this case, it set forth an opinion footnote that has been relied upon and referred to by appellate courts since that decision, that foot note says as follows:

“The reason for writ of prohibition is available in this Court to review a lawyer is manifest. If a party whose lawyer has been disqualified is forced to wait until after the final order to appeal, and then is successful on appeal, a retrial with the party's formerly disqualified counsel would result in a duplication of efforts, thereby imposing undue costs and delay.”

“Conversely, if a party who is unsuccessful in its motion to disqualify is forced to wait until after the trial to appeal, and then is successful on appeal, not only is that party exposed to undue costs and delay, but by the end of the first trial, the confidential information that the party sought to protect may be disclosed to the opposing party or made a part of the record. Even if the opposing party obtained new counsel, irreparable harm would have already been done to the client if it were not allowed to challenge by the exercise of original jurisdiction in this Court through a writ of prohibition effectively emasculate any other remedy”.

While the facts of this civil case are different from the current criminal matter at bar the Court's rational in deciding to grant the writ of prohibition and set aside the Order of the Circuit Court Judge is applicable in this case. The Court quotes, *State ex rel. Keenam v. Hatcher*, 210 W.Va. 307, 313, S. E. 2d 362, 365 (2001), (holding that a prosecutor was disqualified from bringing a recidivist proceeding even though the prior offenses in which the prosecutor served as defense counsel were public matters) this Court identified a core principle that underlies the attorney disqualification rules:

... a client in order to receive the best legal advice should be allowed to be assured that any private or personal disclosure made to her lawyer will be kept in the strictest confidence...A sacred aspect of the legal profession is that the client must be able to depend on their lawyer, that a client may confer with their lawyer with the “absolute insurance that the lawyer’s is tied from ever discussing it”... Anything less than the strictest safeguarding by a lawyer of a client’s confidences would irreparably erode the sanctity of the lawyer-client relationship.

(Quoting from *State ex rel. Ogden Newspapers, Inc., Wilkes, 198 W.Va. 587, 590, 482 S. E. 2d 204, 207 (1996) (per curiam) (ellipses in original) In Healthnet v. Healthnet, 289 F. Supp. 755, 758 (S.D. W.Va. 2003)*, Judge Goodwin stated:

...I continue to adhere to the rule that courts determining whether to disqualify counsel should act to prevent the appearance of impropriety and to resolve the doubt in favor of disqualification. I interpret the “appearance of impropriety” standard to include an objective component: the moving party that shows that a reasonable former client would be concerned by the conflict.

This Court recently stated in *State ex rel. Consenza v. Hill, 216 W.Va. 482, 288, 607 S. E. 2d 811, 814 (2004)* (upholding a disqualification order even though there was no actual evidence of impropriety).

As the repository of public trust and confidence in the judicial system, courts are given broad discretion to disqualify counsel when the continued representation of a client threatens the integrity of the legal profession.

A circuit court, upon motion of a party, by its inherent power to do what is necessary for the administration of justice, may disqualify a lawyer from the case because the lawyer’s representation in the case presents a conflict of interest where the conflict is such as clearly to call into question the fair and efficient administration of justice. Such motion should be viewed with extreme caution because of the interference with the lawyer – client relationship.

We continued in *Consenza* by quoting the following language from *United States v. Clarkson, 567 F 2d. 270, 273, (4th Cir 1977)*:

In determining whether to disqualify counsel for conflict of interest, the trial court is not to weigh the circumstances “with hair splitting nicety” but, in the proper exercise of its supervisory power over members of the bar and with a view of preventing “the appearance of impropriety.” It is to resolve all doubts in favor of disqualification.

In *State of West Virginia v. Jim Boyd, 1977, WV 90, 233 S. E. 2d 710, 160 W.Va. 234*, the defendant appealed his conviction for first-degree murder. The conviction was set aside and a new trial ordered. The Court’s opinion delivered by Justice Miller, the decision sets forth certain benchmarks of the West Virginia Supreme Court in the prosecution of a criminal defendant and the conduct or misconduct of the prosecuting attorney, they are as follows:

Criminal Law – Duties of the Prosecuting Attorney

The prosecuting attorney occupies a quasi-judicial position in the trial of a criminal case. In keeping with this position, he is required to avoid the role of a partisan, eager to convict, and must deal fairly with the accused, as well as other participants in the trial. It is the prosecutor’s duty to set the tone of fairness and impartiality, while he should vigorously pursue the state’s case in doing so he must not abandon the quasi-judicial role with which he is cloaked under the law.

Criminal Law-

The standard of fair and impartial prenotation required of the prosecutor may become more elevated when the offense charged is of a serious or revolting nature, as it is recognized that a jury in this type of case may be more easily inflamed against the defendant by the very nature of the crime charged.

Justice Miller writes, “This Court has uniformly held that a prosecuting attorney occupies a quasi-judicial position in the trial of a criminal case. In keeping with this position, he is required to avoid the role of partisan, eager to convict and must deal fairly with the accused, as well as, other participants in the trial. It is the prosecutor’s duty to set a tone of fairness and impartiality, and while he may and should vigorously pursue the State’s case, in doing so he must not abandon his quasi-judicial role with which he is cloaked under the law. *State v. Britton, W.Va. 203 S.E. 462 (1974); State v. Hamric, 151 W.Va. 1, 151, S. E. 2d 252 (1966); State v.*

Seckman, 124 W.Va. 740, 22 S. E. 374 (1941); *State v. Summerville*, 112 W.Va. 398, 164 S. E. 508 (1932); *State v. Hively*, 103 W.Va. 237, 136, S.E. 862 (1927).

As corollary to this rule, this Court has also recognized that the standard of fair and impartial presentation required of the prosecutor may become more elevated when the offense charged is of a serious and revolting nature, as it is recognized that a jury in this type of case may be more easily inflamed against the defendant by the vary nature of the crime charged. Thus, in *State v. Seckman*, supra, this Court stated:

“The crime of which this defendant is accused is so revolting that it is difficult for the jury to give the accused the benefit of the doubt”. *State v Gill*, supra; *State v. Graham*, supra 91. Its very nature should have prompted the prosecuting attorney to exercise the highest degree of decorum in the conduct of the trial.”

In a hearing on the said motion on February 11, 2008, commencing at 10:31 AM.

Assistant Prosecuting Attorney Gail Khale addressed the court and said as follows:

(H.T.P. 18 L 19-25) “...I cannot say verbatim what happened with all the meeting with Jessica Morris. I deal with, Your Honor, hundreds of victims of domestic violence every year. Oftentimes, things are said to me in my role, such as are you going to be my attorney in court. Because a lot of people don’t understand the court proceedings, the adversarial process of criminal proceedings. When that

(H.T.P. 19 L 1-17) question is posed to me, I have a general response which I universally give one hundred percent of the time, no, I am not your attorney. I represent the interests of the State and I present evidence to the Court. Many times, many times, the victim of a domestic violence crime does not want to prosecute the perpetrator, has changed their stories. If I was the attorney for that person, I would then have to go and advocate the dismissal of those charges. Oftentimes, I find myself in adversarial relationship with a victim of a crime, forcing that person onto the witness stand, forcing them to give testimony which may be damaging to someone they love. I don’t know if that was ever brought up. I don’t know if Jessica Morris ever asked me – because I don’t recall it, Your Honor. – are you my attorney. But I can tell you if it was brought up what my response was” “No.”

Therefore, Mr. Khale admits that he met with the defendant Jessica Jane Morris several times (less than six) but cannot remember the conversations. Furthermore, Mr. Khale states that

if she had asked if he was her attorney, he would have said no. However, he cannot remember if she asked that question.

The question is not what Mr. Khale perceived of their meetings but what Defendant Jessica Jane Morris perceived of their meetings. That fact that Mr. Khale told the trial court that other people had been under that misconception and that Mr. Khale had to correct them proves that such a perception is possible and almost likely especially if the person in question is largely uneducated and unfamiliar with the workings of the criminal justice system. If the possibility of a misperception clearly exists, and the matter is raised by the defense, then the prosecutor must be disqualified to avoid the appearance of impropriety.

On February 15, 2008, the trial court Judge entered an ORDER denying the defenses motion to disqualify. In that Order the judge basically said that the defense did not offer any proof of conflict. The judge did not address the possibility of an appearance of impropriety.

At a hearing on February 11, 2008, Prosecutor Scott Smith addressed the Court and said the following:

(H.T. Pa. 11 L 14-17) "... So all of these cases that I have cited that involved Jessica Morris preceded the filing of the abuse and neglect petition."

Mr. Smith was correct as far as he went, but he did not advise the Court that his office was involved in a criminal investigation of the alleged sexual assault of minor child Rhaven M., by Mr. Jack Jones, the alleged co-conspirator of Jessica Jane Morris, since March 6, 2003. I respectfully refer this Honorable Court to the following matters of this Court's official record:

March 5, 2003, Wheeling Police Department Incident Report of Possible Sexual Assault of child.

April 14, 2003, Fax to Amanda McCreary from Assistant Prosecutor Paula Silver sending Ohio County Sheriff's Office Report, Ref: Sexual Assault dated April 7, 2003.

It should also be noted that the record does not include the testimony of Defendant Jessica Jane Morris, but, Defense Counsel believes that when Assistant Prosecutor Wood, the same Assistant Prosecutor who assisted Assistant Prosecutor Gail Khale in the criminal case at bar, never advised Defendant Jessica Jane Morris of her Miranda Warning before giving testimony under oath in the abuse and neglect petition hearings. The prosecutor's office was conducting and / or participating in a criminal investigation and may well have obtained inadmissible information from Defendant Jessica Jane Morris's testimony in the abuse and neglect hearings.

Unfortunately, Prosecutor Smith, Assistant Prosecutor Khale and Assistant Prosecutor Wood, during the prosecution of this case, have taken Defense Counsel's Motion to Disqualify the Ohio County Prosecutor's Office as a direct assault on their ethics and integrity.

Nothing could be further from the truth. Defense Counsel is duty bound to raise legal issues, if he believes that they are pertinent, have a basis in fact, and affect the ability for his client to receive a fair trial. Defense Counsel understands that in the heat of battle tempers sometime flare and personalities collide. Defense Counsel has made no allegations of misconduct or unethical actions by the members of the Ohio County Prosecutor's Office.

Defense Counsel further understands how the degree of alleged depravity can affect the attitude of the prosecutors. The prosecutors were simply seeking justice for a child that allegedly was abused and assaulted in the most grievous manner. Defense Counsel has done legal battle with these prosecutors in the past and believes them to be honest, hardworking, dedicated public servants doing a difficult job. Nothing in this record is or was intended to impugn, insult or smear the reputation of people who I respect both professionally and personally.

Defense Counsel must remember the legal maxim put forward by Justice Blackstone, i.e.,

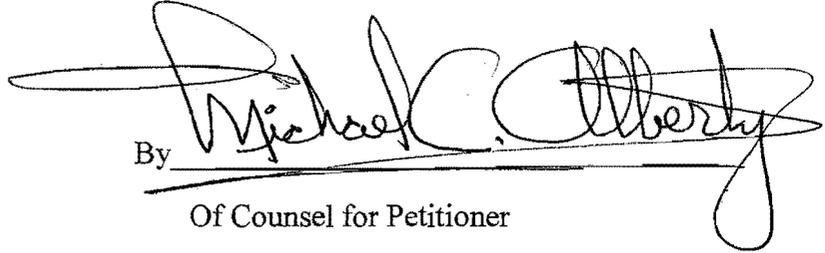
“it is better that ten (10) guilty men go free rather than one (1) innocent man be convicted of a crime that he did not do (paraphrased).” This is such a case where the alleged facts are shocking and disgusting and that additional efforts should have been taken not to inflame the jury so they could give proper consideration to the evidence without personal bias or reaction.

CONCLUSION

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

Respectfully submitted,

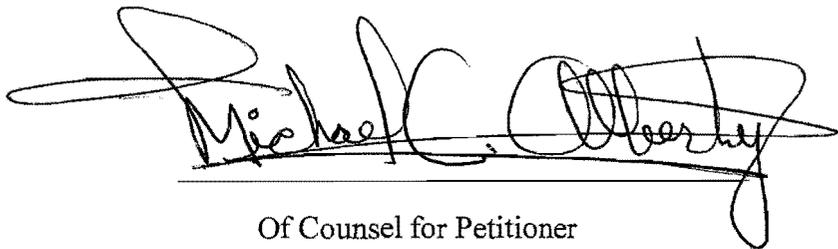
JESSICA JANE MORRIS, DEFENDANT

By 
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CERTIFICATE OF SERVICE

Service of the foregoing *APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR APPEAL* was had upon the Respondent by depositing a true and correct copy in the U. S. Mail, First Class, Postage Pre-paid, addressed to Prosecuting Attorney of Ohio County, West Virginia, City-County Building, Second Floor, 1500 Chapline Street, Wheeling, West Virginia, 26003, this 31st day of March, 2010.



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