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**I. APPELLANT'S RESPONSE TO APPELLEE'S
ARGUMENT THAT, "THE TRIAL TESTIMONY OF
R.M.'S FOSTER MOTHER, SALLY KEEFER, WAS
PROPERLY ALLOWED BY THE CIRCUIT COURT"**

Mr. Kahle argues that, "Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion." State v. Louk, 171 W.Va. 639, 643, 301 S.E.2d 596, 599 (1983)' Syllabus Point 2, State v. Peyatt, 173 W.Va. 317, 315 S.E.2d 574 (1983)" Syllabus Point 1, State v. Pettry, 209 W.Va. 449, 549 S.E.2d 323 (2001). Mr. Kahle is in error.

Mr. Kahle first argued to the Court, in response to Defense Counsel's continuing objections, that Ms. Keefer's hearsay testimony should be admitted under Rule 803 (4) of the West Virginia Rules of Evidence and also under Syllabus Point 9 of Petty, the Circuit Court disagreed and refused to admit the hearsay testimony. Mr. Kahle now argues (appellant's brief P.7 L1-3) that he then offered the testimony of Ms. Keefer, "...not to prove the truth of the matter asserted, but rather offered them to prove the advanced sexual knowledge of the seven year old declarant. Mr. Kahle fails to mention one such exchange with the trial court judge.

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 fallback 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 that 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.105).

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. You 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 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.

Mr. Kahle never specifically cites what hearsay exception under Rule 803 of the West Virginia Rules of Evidence that his exception is, i.e., to prove the advanced sexual knowledge of the seven year old declarant; but Defense Counsel assumes that Mr. Kahle was attempting to use Rule 24 of the hearsay exceptions that recites as follows:

(24) Other exceptions. –A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant. (As amended by order entered June 15, 1994, effective July 1, 1994.)

Assuming that Rule 24 was the vehicle, which appears to be the only vehicle available to him to have the hearsay evidence admitted under the guise of “Proof of advanced sexual knowledge of the seven year old declarant,” it still was not properly admitted due to the fact that it (hearsay evidence) did not have equivalent circumstantial guarantees of trustworthiness due to the fact that (A) the statement is offered as evidence of a material fact. Mr. Kahle argues that the hearsay evidence is evidence of a material fact; however, the declarant testified that she had viewed pornographic movies and observed explicit sexual acts. The declarant could have achieved her advanced sexual knowledge from the pornographic movies. Also, Mr. Kahle never specifically asked Ms. Keefer if the declarant acquired her advanced sexual knowledge from the alleged sexual assaults and Ms. Keefer would have no firsthand knowledge upon which she could base an honest answer. Furthermore, the Assistant Prosecutor Jenna Wood never inquired of the declarant as to where she obtained her advanced sexual knowledge. It is not sufficient to theorize that the advanced sexual knowledge was a result of the alleged sexual assaults. Finding under Section (B), the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts. Certainly, inquiring of the declarant on direct examination could procure the information with reasonable effort. Findings under Section (C), the general purpose of these rules and the interests of justice will best be served by the admission of the statement into evidence.

Without the proper judicial findings under Sections (A), (B), and (C) of Rule 24 of the West Virginia Rules of Evidence, the “fallback position” of Mr. Kahle is not sufficient for the admittance of the hearsay testimony into evidence.

Furthermore, the fact that Mr. Kahle calls it a “fallback position” indicates it is not the real reason the testimony was offered. Evidence should not be allowed in the back door, simply because someone says “I have a fallback position.” The words fallback position can be substituted for the words false of disingenuous position.

Furthermore, Mr. Kahle bases his argument that the trial testimony of Sally Keefer was properly allowed by the Court on three (3) cases, *State v. Louk*, 171 W.Va., 639, 643, 301 S.E. 2d, 596, 599 (1983), *Syllabus Point 2*, *State v. Peyatt*, 173 W.Va. 317, 315, S.E. 2d 574 (1983), *Syllabus Point 1*, *State v. Pettry*, 209 W.Va., 449, 549, S.E. 2d. 323 (2001).

Appellee seeks to rely on *State v. Louk*. His reliance on Louk is misplaced. The Louk case was a double murder trial wherein the Defendant Victoria Louk shot and killed two people, her son-in-law, David Patrice and Randall Riffle. The defendant cited several errors by the trial court. The main error, other than jury instructions, was the fact that the police again interrogated her after she had given notice of her intent to detain counsel and desire not to speak without the presence of her attorney.

A side issue was that the trial court judge refused to admit various testimonies about Petrice’s army records and both victims’ criminal convictions and quarrelsome, violent natures.

Although this Honorable Court reversed the conviction and remanded the matter back to the trial court, this Honorable Court did state that, “The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such actions amount to abuse of discretion.

Mr. Kahle incorrectly relies upon this case due to the fact that there was no stated hearsay evidence question. The Morris' trial court judge did abuse his discretion in that the laws surrounding the admittance of hearsay and exception rules were not followed.

Mr. Kahle again goes syllabus shopping and comes up with the Peyatt case. He relies on Syllabus 2 which states, "Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been abuse of discretion..."

The Peyatt case is a sexual assault case on his step-daughter. The State's experts testified that the alleged victim's hymen was "obliterated." The defendant attempted to introduce evidence that "S" had been sexually promiscuous with other men in order to rebut the inference raised by the prosecutor's medical expert that appellant was responsible for her "obliterated" hymen. The trial court conducted an in-camera hearing and then ruled the evidence inadmissible under the Rape Shield Statute. It should be noted and Mr. Kahle should have noted that this is a 1983 case and the Rape Shield Law has changed significantly since this case. This case did not revolve around the admittance of hearsay evidence. This Court affirmed Peyatt's conviction. However, Justice Neely authored a dissenting opinion that does have implications in the Morris case at bar.

Neely, Justice, Dissenting: In all regards this is a tragic case. The record reveals that the Peyatt family lived in a squalor that is almost beyond the imagination of most ordinary people. The actions of the defendant that are alleged by the State are such as to inflame our passions and outrage our sensibilities. Nonetheless, this is a serious case involving twenty years of prison and the defendant is entitled to all evidence that could possibly raise a reasonable doubt about his guilt in any juror's mind. Consequently, I must Dissent from the

court's holding in section II of the majority opinion, for reasons that I have already explored at length in my Dissent in *State v. Green*, 163 W.Va. 681, 260 S.E. 2d 257 (1979).

The victim in the case before us testified that she had not had sex with any person but her father and that she had never seen another penis. The defendant proffered evidence from siblings that the victim had confessed to sexual relations with others and that those siblings had witnessed events that would lead an observer to conclude that the victim had engaged in sexual relations with others. The offer of testimony disclosed in the in-camera hearing did not consist of eyewitness evidence of the victim's sexual intercourse with others, but it did consist of circumstantial evidence that might have led a reasonable person to conclude that the victim had had sexual relations with men other than her father. Apparently the siblings were willing to testify that an older man got into bed with the victim and the bed shook, and they were also willing to describe the victim under a pile of leaves with a male companion under compromising circumstances. Certainly evidence of this type would be admissible in a divorce case if the issue were adultery.

The victim's past sexual history was placed in issue because the condition of her hymen was used as circumstantial evidence to incriminate the defendant. Furthermore, testimony was elicited from her regarding her lack of sexual contact with men other than her father. If, indeed, the testimony proffered by the defendant were sufficient to convince a member of the jury that the victim had lied under oath about her prior sexual experience, such a blow to her credibility might have been sufficient to raise a reasonable doubt about her primary accusatory testimony.

I am also un-persuaded by the majority's assertion that the men who allegedly engaged in sexual relations with the victim should have been called as witnesses. What man in his right mind would admit to sex with an under-aged minor in open court? The options of the Fifth Amendment and a grant of immunity are, of course, always open when such testimony is sought, but the far more practical course is to lie. If the men chose the option of lying, the defendant would have been worse off than by not offering their testimony.

The right to confront witnesses is a constitutional issue that goes directly to the truth-finding function of a court. Unlike so many of our other constitutional rules in criminal cases, it is not aimed at regulating official conduct in the abstract, but rather at assuring that particular individuals in very concrete cases are not convicted when they are innocent. *Naum v. Halbritter, W.Va., 309 S.E.2d 109 (1983).*

Mr. Kahle was in error in his interpretation of the case of *State of West Virginia, Plaintiff v. Jeffrey Allen Pettrey, 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 Pettrey, Defendant (209 W.Va. 449, 559, S.E. 2d, 323, 2001)*, Mr. Jeffrey Allen Pettrey 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 Pettrey case and Ms. Keefer in the case at bar. Basically, there is no comparison and the Pettrey 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* (1983 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.

**II. APPELLANT'S RESPONSE TO APPELLEE'S
ARGUMENT THAT APPELLANT'S SIXTH
AMENDMENT RIGHTS WERE NOT IMPLICATED
BY THE TRIAL TESTIMONY OF SALLY KEEFER**

Appellant is shocked at Mr. Kahle's statement that, "...Appellant devoted a large portion of her brief in reciting extended direct quotes from the case of *Crawford v. Washington*, 541 U.S. 36 (2004), and the *Crawford* Court's discussion of the subtle distinction and differences between "testimonial" and "non-testimonial" hearsay. This is a fine discussion; *however, it really has no bearing on the admission of the trial testimony of Sally Keefer in the Appellant's underlying matter.* (emphasis added).

In the case at bar, R.M. was the out-of-court declarant, and R.M. *testified* at trial. Appellant's right to confront and cross-examine was satisfied because she did confront and cross-examine her accuser, R.M. *While this is somewhat of an oversimplification of*

the holdings in Crawford it is all that is necessary to dispense with this point of “error” as it appears that Appellant does not comprehend that Crawford is inapplicable when the declarant is available and actually testifies at trial.

Appellant is certain that U. S. Supreme Court Justice Scalia would be shocked to discover that Assistant State Prosecuting Attorney Kahle can summarize the twenty-eight page decision that affected every criminal state and federal court in this country in only forty-six (46) words.

It must also be noted that Mr. Kahle was disingenuous when he states that the declarant testified and that appellant’s right to confront and cross examine was satisfied when she did confront and examine her accuser, R.M. What Mr. Kahle does not tell this Honorable Court is that after direct examination of R. M by Assistant Prosecuting Attorney Jenna Perkins Wood, the state objected to any questions outside the scope of direct examination. The trial court abused its discretion when it limited the cross examination of R. M with regard to Ms. Keefer’s testimony. Therefore, a severely limited right to confront is in essence no right to confront at all and a violation of Appellant’s Sixth Amendment Rights.

Prosecutor Kahle made other misinformed statements to the court in addition to his “fallback positions,” such as, that the trial court could admit here-say 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 here-say 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 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 here-say 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 test does not alone resolve this case. One could plausibly read "witness against" a defendant to mean those who actually testify at trial, *see 3 J. Wigmore, Evidence 1397, p. 104 (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 that 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. 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 definitions – 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, is not 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 333-335, 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, R.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, R. M., as to what purpose the statements of R. M. were made. The question is not why Ms. Keefer kept a record of the statements but, rather what was R. M.,’s purpose for making such statements.

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 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 here-say statement is testimonial.” The Court of Appeals further observed that “the United States Supreme Court determined in Crawford that “as 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 states “North Carolina has recognized in Crawford an additional prong necessary to show 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, R M., was testimonial or non-testimonial.

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, R M., when she was called testify.

Mr. Kahle may have unintentionally misled the court, because he knew that his associate, Prosecutor Wood, was going to conduct the examination of R.M. Furthermore, the prosecutors had already prepped R 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 R 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 of 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.

Appellant 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, R M.

III. APPELLANT’S RESPONSE TO APPELLEE’S ARGUMENT THAT THE TESTIMONY OF SALLY KEEFER WAS ADMITTED FOR REASONS OTHER THAN THE TRUTH OF THE MATTER ASSERTED, THEREFORE, APPELLANT’S ASSIGNMENT OF ERROR IS COMPLETELY MISPLACED.

The appellee continues to argue that the hearsay statements of Ms. Keefer should have been admitted under Rule 803.4 of the West Virginia Rules of Evidence. Mr. Kahle maintains “...statements made for the purpose of medical diagnosis or treatment and describing medical history, on past or present symptoms, or the inception or general character of the cause of the external source; therefore, insofar as reasonably pertinent to diagnosis or treatment.”

Mr. Kahle simply repeats his unsuccessful and meritless argument that he made at trial. The trial judge ruled against this argument. Even though Mr. Kahle was successful in having Ms. Keefer answer a leading question in the affirmative, we must examine the facts surrounding her testimony.

First of all, Ms. Keefer was employed as a foster parent by the West Virginia Department of Health and Human Services. Ms. Keefer conducted her own questioning of R M. and reported directly to the child’s case worker and then the case worker would report to the prosecutor’s office. The case worker would then arrange medical and psychological testing for R.M. Ms. Keefer is not a medical or psychological professional

nor is she or has she ever been an employee, associate, or representative of medical and/or psychological provider. Her actions were more like a confidential informer for the State of West Virginia who used her relationship as the foster mother, and only real mother figure in R.M.'s case to have informal discussions with her and make notes and then forward those notes to the case worker.

Rule 804(c) speaks to statements that are made to her medical provider so that he or she can properly determine the treatment for the ailment or problem. R M. was not requiring immediate medical treatment. Her alleged attacks had been committed as early as years before Ms. Keefer had ever met her. Furthermore, the Ohio County Prosecutor's Office was aware and conducted an open investigation as early as 2003.

Mr. Kahle then goes back to the case of *State of West Virginia, Plaintiff Below, Appellee v. Jeffrey Allan Pettrey, Defendant Below, Appellant. (209 W.Va. 449, 549, S.E. 2d 323, 2001, W.Va.)* This is the case that Mr. Kahle loudly and proudly presented to the trial court as a "huge exception" to the hearsay rule (trial transcript P. 19L. 14-15).

The Appellant now represents to this Honorable Court that, "...The Pettrey case in some aspects presents facts similar to this presented herein." In order the properly demonstrate that the Pettrey case does not present similar aspects present in the Appellant's case, we should examine each of Mr. Kahle's point, as follows:"

"The appellant in Pettrey challenged the trial court's admission of several extra judicial disclosures of sexual abuse by child victims of the appellant to various players, including a school teacher, a counselor, and the victim's grandmother.

Mr. Kahle fails to grasp the professional and legal requirements of a school teacher to report any allegations of sexual abuse, or child abuse, to the state authorities.

Not only did the counselor have those same legal and professional duties as the teacher, in addition, to the fact the statements to the counselor does clearly fall under the Rule 803 (4) of the West Virginia Rules of Evidence as a clear exception to the hearsay rules. Mr. Kahle does not disclose the professional education and credentials of Ms. Keefer, simply because she has none. She is a housewife, no offense or insult intended to housewives, who has, with her husband, been approved by the West Virginia Department of Health and Human Services to act as foster parents. While “foster parents” provide a noble and necessary service in the protection of children placed in their care, the only requirement for becoming a foster parent is a criminal background check and an interview.

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 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 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.

Appellee states that "Statements which are not offered for the truth of the matter asserted do not implicate the Sixth Amendment right to confrontation."

Citing again the Pettrey case "Appellant would suggest the necessity of looking behind the trial court's statement in Pettrey by looking as to what basis that statement was based upon." In reviewing Pettrey at Paragraph 41 states, "In the case at bar, the Circuit Court determined that D.R.'s actions at school were 'obviously admissible.'" The

Pettrey Court further ruled that the statements made by D.R. to his teacher were admissible under *State v Edwards Charles, L. Sr. (398 S.E. 2d 123, 183 W.Va. 641)*.

It is, therefore, prudent and advisable to examine the *Edward, Charles L., Sr. (398 S.E. 2d 123, 183 W.Va. 641)* case to determine what logic and legal precedent that the Pettrey trial judge relied upon.

Charles L. Edwards, Sr. has convicted in the Circuit Court of Mineral County, West Virginia, on May 28, 1987, of two counts of first degree sexual assault and two counts of first degree sexual abuse. This Honorable Court affirmed the conviction of Charles L. Edwards, Jr.

The appellant, Edwards, had raised several issues on his appeal. Appellant Morris will address only the issues related to the case at bar and the position taken by the Pettrey Court with regard to hearsay exceptions.

Paragraph 16, L. 5 of the Edward's case, sets forth a two part test for admitting hearsay to W.Va. R. Evid. 803.4, (1) the declarant's motive in making the statements must be consistent with the purposes of promoting treatment and (2) the content of the statement must be such as is reasonably relied upon by a physician's diagnosis or treatment.

In the case at bar, the state never inquired of the declarant (alleged victim, R.M.) as to her motive in making the alleged statements nor by other evidence provided that the statements were consistent with the purposes of promoting treatment nor did the state inquire of its experts that the statement was such as reasonably relied upon by a physician in treatment or diagnosis. The state's experts and their reports clearly relied on R.M.'s

statement to them or their staff and did not testify that they (state's experts) relied on any statements of the declarant/alleged victim to her foster mother, Sally Keefer. Therefore, the statements made by the declarant/victim is not an exception to the hearsay rule

The Edward trial judge also permitted the child's mother to testify and the court said as follows:

The trial court also permitted the victim's mother to testify without objection regarding extrajudicial statements made by her son involving the sexual assaults. It is extremely important to note, however, that each child also testified regarding the matters contained in the statements to the mother and to Dr. Trainor, and was subject to cross-examination by the appellant. These statements do not fall under the excited utterance exception to the hearsay rule found in W.Va. R. Evid. 803(2) because they were not statements made by the declarant 'relating to a startling event or condition...while the declarant was under the stress of excitement caused by the event or condition.' Id. However, other courts have admitted statements like these made by child victims to a parent under other exceptions to a parent under other exceptions to the hearsay rule.

In Matter of Lucas, the court admitted statements made by a three-year-old child to her mother that a juvenile boy had sexually assaulted the little girl anally. 380 S.E.2d at 565. The court upheld the admissibility of these statements made several days after the incident under Rule 803(4) which involve statements made for the purposes of medical diagnosis or treatment. Matter of Lucas, 380 S.E.2d at 566. The court reasoned that "the child's statements were pertinent to diagnosis and treatment as they suggested to the doctors, the nature of the problem which in turn directed the doctors in their examination of the child." Id. Likewise, in the instant case, the mother's testimony concerning her son's statements was presented primarily to explain why she took the children to the psychologist, not for the purpose of proving the matter asserted.

Other courts have permitted hearsay statements, such as those present before the Court, under Rule 803 (24). West Virginia Rule of Evidence 803 (24) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(24) Other Exceptions: -- A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guaranteed of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of Justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or

hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including theme and address of the declarant.

In the case at bar, the trial court abused its discretion and created plain error when the trial court Judge failed to make a finding that the statement(s) not specifically covered by the hearsay exceptions, ie., as Mr. Kahle has stated, “showing the advanced sexual knowledge of the alleged victim, K.M., had equivalent circumstantial guarantees of trustworthiness by determining the following (A) The statement is offered as evidence of a material fact. Black’s Law Dictionary, Ninth Edition, defines material fact as a fact that is significant or essential to the issue or matter at hand. The question is whether the alleged victim’s alleged advanced knowledge of sex is a material fact to the proof that she was sexually assaulted. Surely a child with no advanced knowledge of sex can be just as likely a victim of sexual assault and/or abuse as well as a child with advanced sexual knowledge. Furthermore, the alleged child victim’s sexual knowledge is not a factor or material element of the crime. Appellant believes that it is not a material fact and with a judicial finding to the contrary does not satisfy requirement A.

(B) The statement is more probative on the point for which it is offered than other evidence which the proponent can procure through reasonable efforts. The state called and examined three experts and two previous and current case workers from the West Virginia Department of Health and Human Services as witnesses for the prosecution. The Prosecutor could have easily inquired of the alleged victim, K.M., or introduced expert testimony as to the level of sexual knowledge of the alleged victim, K.M. from the interviews and intensive tests. The State made no such inquiries. The trial made no such findings. Appellant believes this argument of sexual knowledge is a subterfuge for the

state to being able to introduce improper hearsay evidence in the trial to incite and alarm the jury regarding facts that no other witness would be asked to testify to. Therefore, the hearsay questionable testimony do not satisfy Requirement B.

(C) The general purposes of these rules and the interests of justice will best be served by the admission of the statement into evidence. Appellant believes that it is obvious that Mr. Kahle attempted to and succeeded in using stated subterfuge of sexual knowledge to defeat the general purposes of the rules and the will of the legislature of the State of West Virginia. In doing so, he was able to inflame and taint the jury, thus denying the Appellant a fair trial. The trial judge abused his discretion and created plain error by failing to enforce the West Virginia Rules of Evidence and permitting the testimony of Ms. Keefer before the trial jury.

This Honorable Court, in paragraph 112 of the Edwards case said as follows: **“Furthermore, it is important to bear in mind that most of the cases analyzing the admissibility of hearsay statements under Rule 803(24)(5) haven been decided in contexts where the declarant was not present to testify in person. It is extremely important to recognize that in the defendant’s trial, each child was present, testified in court, and was cross-examined by defense counsel. Furthermore, neither the mother nor the psychologist added anything substantive to the children’s testimony. It would cause us grave concern as to the propriety of the mother’s testimony if the children gave a barebones or sketchy account of what occurred and then the mother was permitted to expand upon or add detail and substance to such testimony through the children’s extra-judicial statements. Such was not the case here. Judge Weinstein and Professor Berger have written that “the availability of the declarant at trial vitiates the main concern of the hearsay rule, which is the lack of any opportunity for the adversary to cross-examine the absent declarant.”** ***fn21**

“Not only are hearsay dangers minimized by the presence of the declarant, but such appearance removed potential confrontation clause issues as well. *fn22** Furthermore, since the defendant claimed maternal coaching of the children, the mother’s account of the child’s statements to her gave the jury a fuller opportunity to observe her demeanor and her motivations in recounting such statements. The testimony of the mother and psychologist presented the defendant an opportunity to explore on cross-examination any coaching or motive on behalf of the mother or psychologist to help the children fabricate the accusations. When a child witness is present to testify, however, it would generally**

seem to be a better practice not to permit a parent to testify as to the child's extrajudicial statements unless such testimony clearly falls into one of the hearsay exceptions. But it is harmless when, viewed in the spectrum of all the evidence, it creates no prejudice to the defendant. The statements comport to this hearsay exception and the general rules of evidence because they not only meet the relevancy and probativeness requirements but the fact that the children testified at trial and were subject to cross-examination ameliorates the real risks of admitting hearsay.

Therefore, we conclude that the mother's testimony was properly admitted at trial by the lower court, since the children were present to testify and be cross-examined; the mother added nothing substantive to the children's direct testimony, and primarily related the child's statements not to prove the truth of the matter asserted, but to explain why she took them to the psychologist; and because the mother's motivations were an issue raised by the defense; and therefore her appearance on the stand provided the defendant an opportunity to cross-examine her and the jury a change to observe her demeanor and assess her motivations and credibility.

Appellant would first like to draw this Honorable Court's attention to its statement in the Edward case, as set forth above, "...It would give us great concern as to the propriety of the mother's testimony if the children gave a bare bones or sketchy account of what occurred and the mother was permitted to expand upon or give detail and substance to such testimony through the children's extrajudicial statements.

However, not only did the foster mother, Sally Keefer, expand upon and gave details and substance to such testimony through the alleged victim child's extrajudicial statements. To make matters worse, the trial court judge permitted the prosecutor to call the foster mother, Sally Keefer, as his first witness.

The trial judge abused his discretion and created plain error, when over strenuous objections of defense counsel, he did not interrupt and stop the testimony of the foster mother, Sally Keefer, as the state's first witness. The trial court judge said that he making a ruling (see trial transcript P. 21 L. 23-25) when he said as follows:

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 R

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 trial court judge never finished his ruling and continued to allow the testimony of the foster mother, Sally Keefer, to continue abusing his discretion and creating plain error. The Pettrey Court relied on this Honorable Court's Conclusion and now the appellee does the same with the case at bar.

Appellant believes that it is abundantly clear that the facts of Edward and Pettrey do not match the facts in the case at bar.

**IV. APPELLANT'S RESPONSE TO APPELLEE'S ARGUMENT
THAT THE TRIAL COURT SUSTAINED THE STATE'S OBJECTION
OF VICTIM, R.M. REGARDING OTHER ALLEGATIONS OF SEXUAL
ABUSE BY THE VICTIM, R.M.**

The trial Court abused its discretion and created plain error when it sustained the State's objection to Defense Counsel's questioning of R 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 R 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 penetrated by anyone else other than her mother. It's not admissible. If there's no claimed injury for which there as 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, rR 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, R 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 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, R 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 R M. dated March 5, 2003, wherein Ms. Dierkes states that the alleged victim, R M., told her that “Jack Jones had touched her (R. 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, documents Jack Jones’ statement that, “...during the summer of 2001, R.m. 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 (R.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 (R.M.) said, “Yes, David Burch did, but Jack did it a lot more.”

I respectfully direct this Honorable Court to the September 15, 2008 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, R. 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.

Appellee seeks to defend the State's objection under Rape Shield and defend the trial court's decision to prohibit the cross-examination of alleged victim, R.M., with Syllabus I of the case of *State of West Virginia, Plaintiff Below, Appellee v. Ronald Lynn Calloway, Defendant Below, Appellant* (207 W.Va. 43, 207. 528 S.E. 2d. 490, 528).

...”The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.” Syllabus Point 1, State v. Calloway, 207 W.Va. 431, 528 S.E.2d 490 (1999)...”

Rather than basing its response on one syllabus of the *State v. Calloway* (207 W.Va. 528 S.E. 2d 490 (1999)) case, as the appellee did, appellant would like to review the case itself.

Defendant Ronald Calloway was convicted in August, 1998, on six counts of second degree sexual assault, W.Va. Code 61-8B-4 (1991) and one count daytime entering without breaking, W.Va. Code 61-3-11(b) in connection with an episode where he forced his way into a woman’s home, severely beating her when she attempted to escape, and forced her to engage in repeated acts of oral sex. This Honorable Court affirmed his conviction.

The sole issue raised by Calloway was that the trial court error in excluding results of DNA testing performed on a stain found on the victim’s futon mattress, which indicated the presence of semen that could have come from the defendant.

The Calloway Court excluded the DNA evidence under the West Virginia Rape Shield Act. This Honorable Court spoke very loudly and was forewarning about the use of the Rape Shield Act vs. constitutional rights to present a defense at trial.

This Honorable Court went on to say as follows:

“He relies primarily on *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973), which holds that courts may not mechanically apply evidentiary rules so as to deny the admission of reliable and relevant evidence critical to an accused’s defense. In line with this authority, we held in *State v. Jenkins*, 195 W.Va. 620, 466 S.E.2d 471 (1995), that “a trial judge may not make an evidentiary ruling which deprives a criminal defendant of certain rights, such as the right to examine witnesses against him or her, to offer testimony in support of his or her defense, and to be represented by counsel, which

are essential for a fair trial pursuant to the due process clause found in the Fourteenth Amendment of the Constitution of the United States and article III, 14 of the West Virginia Constitution.” Id. At 628, 466 S.E. 2d at 479.”

This Honorable Court went on to set up a test as follows:

“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.

Appellant believes that she was denied due process and her right to a fair trial because (1) the testimony was certainly relevant that the alleged victim (K.M.) had accused other adults of sexually assaulting her. (2) the probative value of the evidence outweighed its prejudicial effect because it was exculpatory. Furthermore, testimony as to why law enforcement did not charge those other accused adults is exculpatory. And the final test is that the State of West Virginia felt the information regarding other accused adults was exculpatory because it revealed the information in discovery to the defense and (3) the State’s compelling interest was outweighed by far by the defendant’s right to present relevant evidence supportive of her own defense.

Appellant believes that under the results of this test, that there has been a clear abuse of discretion and this Honorable Court must reverse the trial court’s ruling and award the defendant a new trial.

Justice Starcher wrote a concurring opinion in the Calloway case that specifically speaks to the issues of the case at bar, and states as follows:

“I write separately to emphasize the consistent recognition by this Court that a trial court must give a defendant in a rape case every fair opportunity to fight charges against him.

Rape shield laws cannot under any circumstances be applied in such a way as to deny a defendant the full constitutional right to confront his accuser.

Why is the constitutional right to present a full defense so important?

One reason is that the criminal trial process is far from perfect. Factually guilty people are sometimes not convicted of a crime they actually committed. And sometimes innocent people are convicted of crimes they did not commit. Just this year, a West Virginian who had been in prison for over 15 years on a rape charge was freed because of newly discovered DNA evidence.

In the instant case, the trial court's ruling applying the rape shield law did not injure the defendant's right to a full defense. (Nevertheless, if I had been the trial court, I probably would have let the semen stain evidence in.) Trial courts must hold the defendant's need and right to present a full defense as sacrosanct, and must resolve all doubts in favor of that.

Assistant Prosecutor Kahle then seeks to support the State's and the Court's actions by reciting syllabus 6 of the *State of West Virginia, Plaintiff Below, Appellee, v. Charles Barry Guthre, Defendant Below, Appellant* (205 W.Va. 326, 518, S.E. 2d. 83, 1999).

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)..."

In the case at bar, Appellant had disclosed its witness list properly to the State. Furthermore, evidence of the alleged victim's, R.M., accusations against other adults were admitted into the court record by the State of West Virginia in its discovery response to the defense of possible exculpatory evidence.

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.

Mr. Kahle then makes his same, repetitive false argument that, "...For counsel for the Appellant to pose this question to the 9 year old victim, R.M., was reprehensible. Counsel for Appellant misrepresents to this Court that R.M. made "apparent false accusations of rape against other family members and acquaintances." There is no evidence in the record that R.M. ever accused anyone other than co-conspirator, Jack Jones, of vaginal penetration or falsely accused anyone of sexual misconduct..."

Appellant has repeatedly directed this Honorable Court to sections of the record that clearly and reliably and relevantly set forth allegations of accusations of sexual assault against family members and other adults.

Appellant's attorney was ordered by the Circuit Court to not disseminate or disclose any information contained in the abuse and neglect hearings, which amounted to volumes of information. The court ordered Appellant's attorney to destroy the abuse and neglect transcripts after the trial. Those transcripts were replete with many such

allegations. Assistant Prosecutor Jenna Perkins Wood conduct what seemed a hundred (100) hours of direct and cross examination of the defendant over a three (3) year period and was well aware of the said allegations. Ms. Wood also served as Mr. Kahle's associate trial counsel in the criminal trial of the appellant.

Appellee then argues that Appellant's reliance upon *State of West Virginia v. James Quinn* (200 W.Va. 432, 490 S.E. 2d. 34, 1997) is not applicable because Appellant failed to comply with the Quinn requirements.

The Quinn case involved the conviction of James Quinn in the Circuit Court of Wetzel County of violating W.Va. Code, 61-8D-5(a).

Appellee argues that Appellant failed to initially present evidence regarding the statements to the court out of the presence of the jury and with fair notice to the prosecution. I would respectfully remind this court that Appellant did indeed file a motion for an in camera hearing to determine the credibility of the witness. I would further remind this Honorable Court that that motion was denied. However, at trial, the prosecution, in open court, and the trial judge himself, denied such a motion ever existed. The trial court judge then agreed with the prosecution that credibility could not be questioned. At the time of cross examination and further, the defense could only cross-examine the alleged victim, R.M., on matters brought forward on direct examination. Quinn does not suggest what should be done when such an egregious error on the part of the trial judge completely eliminates Appellant's opportunity to prove previous false accusations of sexual assault by family members and other adults, which would have

been confirmed by law enforcement investigations and explanations as to why no such charges were filed against the other adults accused by R.M.

Appellant attempted to give adequate notice of proof that the accusations were false as necessary to rely on the falsity exception to the Quinn principle.

Defense Counsel based his request for an in camera hearing on the guidance provided by the West Virginia Court of Appeals in *State of West Virginia v. Robert Eugene Ayers* (369 S.E. 2d 22, 179 W.Va. 365 (April 1, 1988)). In that case the defendant appealed his conviction on three (3) counts of First Degree Sexual Assault and three (3) counts of Incest on his seven year old step daughter. The case surrounds the credibility of a seven (7) year prosecutrix, who testified that she was sexually assaulted by her stepfather on three (3) occasions within a two (2) day period of time. The conviction was affirmed.

The main issue on appeal was the defendant's allegation that the victim had recanted her allegations against him on various occasions and to various different people. Therefore, the defendant believes that 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 trial the motion was renewed and an in camera hearing was conducted. The trial court judge rules that H.M. 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 to determine whether a child may testify. As noted in *Burdette*, the decision to require an additional psychiatric evaluation prior to determining competency is within the judge's discretion.

“A conviction of rape may be had on the uncorroborated testimony of the female, and unless her testimony is inherently incredible her credibility is a question for the jury.” *Syl, pt4., State v. Green*, 163 W.Va. 681, 260 S.E. 2d 257 (1979).

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 to testify against her parents. When dealing with adult witnesses, the issues of competency 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” her uncle 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 court abused its discretion and created plain error which failed to, even at trial itself, make a finding that R.M. was able to testify as a competent and reliable witness for and on behalf of the State of West Virginia.

Appellant respectfully requests this Honorable Court to take special note of Appellee's footnote number four (4) on the bottom of page 16 which states as follows:

“The record contains very limited evidence of any abuse reported by R.M. at the hand of anyone else but Jessica Morris and Jack Jones.”

This is an admission that evidence of abuse reported by R.M. at the hand of anyone else but Jessica Morris and Jack Jones did indeed exist in the official court record. This is exculpatory evidence that the Appellant was denied the right to introduce as evidence. The act of the trial Judge in refusing to make a finding regarding this admitted evidence was an abuse of discretion and created plain error.

Mr. Kahle attempts to minimize the effects of this abuse of discretion and plain error by comparing the alleged victim, “R.M.” in the case at bar with that of “T.M.” the alleged victim in the Quinn case. Mr. Kahle suggests that both alleged victims lived in squalor with regular beer and sex parties. Therefore, Mr. Kahle conjectures that both alleged victims may have been sexually assaulted by other adults.

While Mr. Kahle's color commentary might be interesting, there is no evidence in the record to support it. Therefore, this Honorable Court should strike and ignore any such color commentary in its deliberation of this case.

The Appellee then attacks Appellant's use of the case of *Barbe v. McBride* (521 F. 3rd 444 (4th Cir. 2008)) in support of Appellant's petition for appeal.

Mr. Kahle states that the Appellant fails to point out how any holding therein (Barbe) is applicable to the case at bar.

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

It is incredible that the Appellee does not see the applicability of the Barbe case to the case as bar, as set forth from the language of the Barbe decision language:

"...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 500 U.S. at 151 (quoting Rock 483 U.S. at 56)."

"...In making the Rape Shield Ruling at trial, the state circuit "arbitrary or disproportionate to the state's legal interest". Lucas, court contravened the Rock-Lucas Principle. That is, the circuit court applied a per se exclusionary ruled 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."

Appellant 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 harmless beyond a reasonable doubt. 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."

Therefore, after voluminous arguments by the Appellee, the Appellee (state) has not established beyond a reasonable doubt that the error complained of did not contribute

to the verdict obtained. This Honorable Court must reverse the verdict and remand the case back to the Circuit Court of Ohio County, West Virginia for a new trial.

**V. APPELLANT'S RESPONSE TO APPELLEES ARGUMENT
THAT THE TRIAL COURT PROPERLY SUSTAINED THE STATE'S
OBJECTION TO DEFENSE COUNSEL'S IRRELEVANT QUESTIONING
OF THE CHILD VICTIM, R.M.'S, COMPETENCY WHEN DEFENDANT
HAD FAILED TO PLACE BEFORE THE COURT EVEN A SCENTILLA
OF EVIDENCE TENDING TO SUGGEST THE CHILD LACKED
COMPETENCY**

The Appellee states, "The question of the competency of a witness to testify is left largely to the discretion of the trial court and its judgment will not be disturbed unless shown to have been plainly abused resulting in manifest error." Point 8, Syllabus, *State v. Wilson*, 157 W.Va. 1036, 207 S.E.2d 174 (1974). Syllabus Point 3, *State v. Butcher*, 165 W.Va. 522, 270 S.E.2d 156 (1980)." Syl. Pt. 7, *State v. Humphrey*, 177 W.Va. 264, 351 S.E.2d 613 (1986)." Syl. Pt. 1, *State v. Ayers* 179 W.Va. 365, 369 S.E.2d 22 (1988).

Appellant agrees with the above Appellee's statement because the trial court's judgment was plainly abused resulting in manifest error.

Appellee accuses the Defense Counsel and misstates the record in representing that the prosecutor (Jenna Perkins Wood) misinformed the Court that a motion for a competency hearing had not been requested. The trial transcript is the transcript. The record reflects that upon questioning of R.M. on cross-examination by Mr. Alberty, the following exchange between Mr. Alberty and Ms. Wood occurred:

MR. ALBERTY: Now, what happens if you lie today, do you know?

MS. WOOD: Your Honor, I'd just object.

MR. ALBERTY: On what grounds?

MS. WOOD: He's not raised the issue in a timely fashion. He cannot raise it now in the middle of cross-examination of this nine year old child, Your Honor. It's improper.

MR. ALBERTY: Judge, I raised this issue before the child ever took the stand.

MS. WOOD: No, he did not, Your Honor. Not adequately. Do you want us to approach?

THE COURT: No.

MS. WOOD: It's improper.

Appellant would like to know where the Defense Counsel on the record misstated the fact that the Prosecutor misinformed the Court. That is exactly what the transcript reflects that she did.

Appellant has not accused the Prosecutor of intentionally misinforming the Court. It is quite possible that at that moment in time, she simply forgot that a motion for a competency hearing had been previously filed.

Appellee argues that the trial court judge considered defendant's request and, in an analysis of the applicable law, correctly concluded that the defendant's motion did not seek the appropriate relief...

Appellant respectfully disagrees and believes that the trial court judge abused his discretion and committed plain error. Appellant argues that while the necessity to have a separate psychological review of the witness to determine her credibility is fully within the trial judge's discretion; the decision not to conduct an in-camera hearing is not.

In the defense motion, 'Motion for in-camera Hearing of State's Witness R.M. (R 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 no 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 engaged 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 be 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 a 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 review 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...”

VI. APPELLANT’S RESPONSE TO APPELLEE’S ARGUMENT THAT THE TRIAL COURT PROPERLY DENIED APPELLANT’S MOTION TO RECUSE THE OHIO COUNTY PROSECUTOR’S OFFICE WHEN THE FACTS AS REPRESENTED BY APPELLANT WERE NOT TRUE, AND EVEN HAD THEY BEEN, APPELLANT WOULD NOT HAVE BEEN ENTITLED TO HER REQUESTED RELIEF

Appellee seems to find it difficult to determine exactly the facts in the record upon which appellant is now attacking the judgment of the Circuit Court. Therefore, appellant will now summarize the facts troubling the appellant when, taken as a whole, either represent a conflict or, at the very least, an appearance of impropriety.

1. In 2003, Jessica Morris reports the possible sexual assault of her daughter by Jack Jones to police.

2. In 2003, Jessica Morris becomes a person of interest in what may be an on-going conspiracy to commit sexual assault on R.M.

3. From 2003-2005, Jessica Morris files domestic violence charges against Jack Jones, her alleged conspirator in the case at bar.

4. Assistant Prosecutor Gail Kahle prosecuted the Jack Jones cases.

5. Assistant Prosecutor Gail Kahle admits to meeting with appellant, Jessica Morris, on at least "3" occasions.

6. Assistant Prosecutor Gail Kahle admits he cannot remember the conversations conducted during those meetings.

7. Assistant Prosecutor Gail Kahle does not remember if appellant asked him if he was her lawyer, but insisted that if she had asked the question, that he would have explained that he was not.

8. Assistant Prosecutor Kahle admits that such questions have come up from other crime victims that he has counseled.

9. For at least three (3) years prior to the appellant being charged, Assistant Prosecutor Wood prosecuted abuse and neglect proceedings against the appellant, Jessica Jane Morris.

10. Assistant Prosecutors Kahle and J. Wood are assigned to the criminal prosecution of the appellant.

11. Appellant filed a Motion to Recuse the Ohio County Prosecutor's Office for a conflict or the appearance of a conflict.

12. The Ohio County Prosecutor's Office has several seasoned and experienced trial attorneys who could have handled this case.

13. Prosecutor Scott Smith refused to replace Kahle and Wood which would have removed any appearance of impropriety.

14. Prosecutor Scott Smith personally defended the Motion.

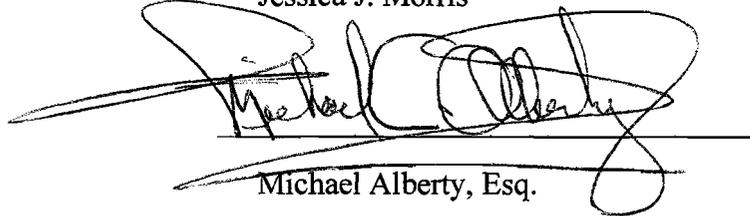
15. Prosecutor Scott Smith warned the trial court judge that, if granted the motion to recuse, that would open the flood gates and the Court would be overwhelmed by recusal motions.

16. The trial court judge ruled that appellant could not prove a conflict, appearance of impropriety or wrong doing and, therefore, denied appellant's motion to recuse the Ohio County, West Virginia, Prosecutor's Office.

CONCLUSION AND RELIEF REQUESTED

The Appellee has failed to demonstrate error in the Appellant's belief. In response to Appellee's Brief, Appellant has answered and replied to each of Appellee's arguments and supported its responses with case law. For all of the reasons set forth in the Appellant's Petition For Appeal, Appellant's Brief in support of its Petition to Appeal and the Appellant's Response Brief, Appellant respectfully requests this Honorable Court reverse the conviction and remand the case back to the Ohio County Circuit Court for further action consistent with this Honorable Court's Guidance and Instructions.

Jessica J. Morris

A handwritten signature in black ink, appearing to read "Michael Alberty", is written over a horizontal line. The signature is stylized and somewhat cursive.

Michael Alberty, Esq.

Attorney for Jessica J. Morris

W.V. Bar I.D. # 6987

63 15th Street

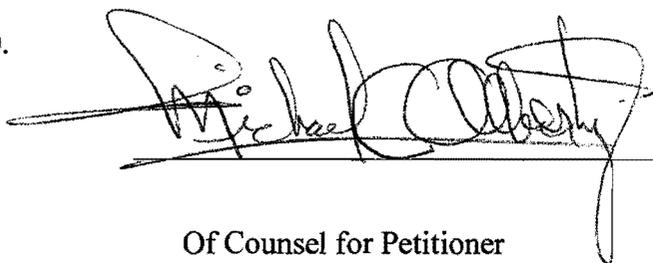
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CERTIFICATE OF SERVICE

Service of the foregoing **APPELLANT'S RESPONSE BRIEF** was had upon the Appellee by depositing a true and correct copy in the U.S. Mail, First Class, Postage Pre-paid, addressed to Gail W. Kahle, Esq., Assistant Prosecuting Attorney and Jenna Perkins Wood, Esq., Assistant Prosecuting Attorney, Office of the Prosecuting Attorney of Ohio County, West Virginia, City-County Building, Second Floor, 1500 Chapline Street, Wheeling, West Virginia, 26003, this 19th day of May, 2010.

A handwritten signature in black ink, appearing to read "Michael C. Alberty", written over a horizontal line. The signature is stylized and cursive.

Of Counsel for Petitioner

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