

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

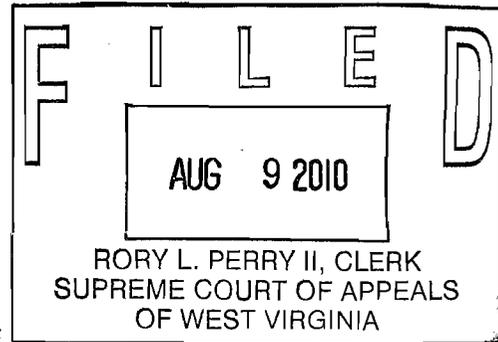
**STATE OF WEST VIRGINIA,  
Appellee**

**v.**

**ELIZABETH DAWN THORNTON,  
Appellant**

**Supreme Court No: 35533**

**Circuit Court No. 08-F-538  
(Kanawha County)**



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**REPLY OF APPELLANT**

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**REPLY OF APPELLANT**

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**INTRODUCTION**

The Amended Brief of Appellee is erroneous in that it contains numerous errors of law and fact, and relies on caselaw that is specifically designated as non-precedential. Instead, as set forth herein, (1) the issue regarding causation and the sufficiency of the evidence was placed squarely before the trial court and preserved for appeal; (2) there is no recognized legal authority holding that a "possibility" of an element of an offense is sufficient to constitute proof beyond a reasonable doubt; (3) misstatements of fact throughout the Brief of Appellee give a distorted and misleading account of the evidence in this case; and (4) the State's distinction between references to "CPS" and references to "CPS proceedings" is refuted by the detailed and unambiguous history of the Appellant's motions and the trial court's rulings in limine.<sup>1</sup>

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<sup>1</sup> The certificate of service for the Amended Brief of Appellee is dated July 21, 2010. The brief was not served on the Appellant, however, but was delivered to the law offices of James Cagle, a law firm with no involvement in this case. The Cagle law firm, in turn, delivered the Amended Brief of Appellee to counsel for the Appellant on July 26. Consequently, in accordance with Rule 10(c) of the Rules of Appellate Procedure, the due date for the Reply of Appellant is August 10.

**I. The Issues Regarding Causation and the Sufficiency of the Evidence Were Fully Preserved for Appeal.**

A. Despite the Assertions of the Appellee, in the Motion for a Judgment of Acquittal the Issue of Causation and the Sufficiency of the Medical Testimony Was Placed Squarely Before the Trial Court and Preserved for Appeal.

The first issue raised in the Brief of the Appellant is that the prosecution's evidence was insufficient to sustain a conviction for child neglect causing death. The State's medical experts testified only to the *possibility* that a delay in seeking treatment may have caused the death of the child. In support of this issue, the Appellant quoted the testimony of the prosecution's medical experts stating only that, with earlier treatment, "there was a chance," a "possibility," "a significantly better chance" that the child could have lived. Brief of Appellant, 13-14.

On this basis, the State's evidence that the Appellant actually caused the death of the child fell far short of the required proof beyond a reasonable doubt. Consequently, the Appellant's motion for a judgment of acquittal, based on the insufficiency of the evidence, should have been granted.

In the Amended Brief of Appellee, the State asserts that the Appellant failed to raise this issue in the trial court, denying the trial court an opportunity to rule on the issue and thereby waiving or forfeiting the issue on appeal. Amended Brief of Appellee, 10-14. The assertions of the State are erroneous.

At the conclusion of the State's evidence, the Appellant moved for a judgment of acquittal based on the insufficiency of the evidence. In responding to the Appellant's argument,

the State itself placed the precise issue squarely before the trial court. As the Assistant Prosecutor stated:

We have four doctors, I think who all have testified if I can recall, at least three of them testified, that had treatment been sought by the caretakers that this child *had a chance* of survival. *No chance* of survival based upon it not being taken to the hospital until the child became unconscious.

Tr. 506-07.

Consequently, the issue of whether a "chance of survival" constitutes sufficient evidence to sustain a conviction for child neglect causing death was directly before the trial court, explicitly placed before the court by the State itself. The trial court agreed with the State that the State's evidence was sufficient. Tr. 508. The Appellant strongly disagrees with the trial court's ruling and has a clearly preserved right to appeal it.

The State also asserts that the Appellant, in raising specific arguments for insufficient evidence, excluded other points such as causation. In support of its position, the State cites the maxim of statutory construction, *expressio unius est exclusio alterius*. Amended Brief of Appellee, 13.

The State's argument is erroneous for numerous reasons. First, as set forth above, the State itself placed the issue of causation directly before the trial court. Second, maxims of statutory construction such as *expressio unius* apply to the construction of ambiguous statutes, and occasionally to the construction of other ambiguous writings, such as contracts or wills. Sutherland, *Statutes and Statutory Construction* § 47:23 (6th ed.), at 304. Maxims of statutory construction are not applicable to oral statements in support of motions in trial court. Third, the oral statements of counsel are not ambiguous: the context confirms that, in arguing the

sufficiency of the evidence, counsel provided a *non-exclusive* list. Counsel used such non-exclusive language as "for example" (Tr. 506); "a long series . . . *starting* with" (Tr. 504-05); and "something similar" (Tr. 505). Such non-exclusive language confirms that counsel did not limited himself to the examples stated. As stated in Sutherland, "The maxim is . . . inapplicable where the listed exceptions were obviously not meant to be the only exceptions." Sutherland, § 47:23 (6th ed.), at 318-19.

Finally, because the issue regarding the sufficiency of the evidence was preserved on appeal, the application of the plain error doctrine is unnecessary. In the event that the Court disagrees, however, the plain error doctrine provides that an objection is not essential to preserve an issue on appeal if the error involves the failure of the evidence to prove "a substantial element of the crime." *State ex rel. Morgan v. Trent*, 195 W.Va. 257, 262, 465 S.E.2d 257, 262 (1995). Because "cause" is a substantial element of the crime of child neglect causing death, the failure of the evidence to establish cause beyond a reasonable doubt, if not objected to at trial, constitutes plain error, and does not preclude the Appellant from raising the issue on appeal.

B. The Omission of an Issue in the Notice of Intent to Appeal Does Not Bar the Issue From Being Raised on Appeal. W.Va. Code 58-4-4 Explicitly Provides That the Grounds Set Forth in the Notice of Intent to Appeal Does Not Restrict the Right to Assign Additional Grounds in the Petition.

In the Amended Brief of Appellee, the State asserts that "Appellants may also waive or forfeit issues if they fail to concisely state the issue in the Notice of Intent to Appeal. In support of this assertion, the State quotes Rule 37 of the Rules of Criminal Procedure, that the notice "should concisely state the grounds for appeal," and Rule 3(b) of the Rules of Appellate Procedure, that the notice "shall concisely state the grounds for appeal."

In the Amended Brief of Appellee, the State does not cite the authority which addresses the *consequences* of omitting a ground from the Notice of Intent to Appeal. The omitted authority is statutory, and the consequences are clear. W.Va. Code § 58-4-4 specifically addresses the Notice of Intent to Appeal in criminal cases, stating "The notice shall fairly state the grounds for the petition *without restricting the right to assign additional grounds in the petition.*" See also, F. Cleckley, Handbook on West Virginia Criminal Procedure, II-491 (Notice of Appeal, *quoting* W.Va. Code § 58-4-4).

Consequently, the Appellant has an explicit statutory right to assign additional grounds not included in the Notice of Intent to Appeal. The Appellee's assertion that the omission of a ground may result in waiver or forfeiture is erroneous.

**II. Numerous Opinions Cited by the Appellee Do Not Stand for the Propositions Asserted, or Are Specifically Designated by the Issuing Court to Have No Precedential Value. Despite the Assertions of the State, There is No Legal Authority Holding That a "Possibility" Is Sufficient to Constitute Proof Beyond a Reasonable Doubt.**

In its brief, the State repeatedly asserts that testimony of a "possibility" that the neglect caused a death is sufficient to sustain a conviction for neglect causing death. The State, however, does not cite a single authority that specifically states that a "possibility" is sufficient to constitute proof beyond a reasonable doubt. Although the word "possibility" is repeatedly used throughout the State's brief (Amended Brief of Appellee, 16-17, 19-20, 23-24, 25-27), the word does not appear to be contained in a single authority that the State cites in support of its assertion.

There is no authority stating that a possibility is sufficient to sustain a conviction because such a ruling would contradict the holding of the United States Supreme Court in *Jackson v.*

*Virginia*, 443 U.S. 307 (1979). In *Jackson* the Court reiterates that proof beyond a reasonable doubt is required for "every fact necessary to constitute the crime with which [a defendant] is charged." 443 U.S. at 315, quoting *In re Winship*, 397 U.S. 358, 364 (1970). Most significantly, the Court in *Jackson* explains that the standard required for proof beyond a reasonable doubt is "the decisive difference between criminal culpability and civil liability." 443 U.S. at 315.

The standard that the State urges -- that a possibility is sufficient to sustain a conviction -- would not only defy the ruling of the United States Supreme Court in *Jackson*, it would lower the standard of proof in a criminal case to below that of the standard in civil trials.

The specific authority that the State sets forth in its brief does not, in fact, support the State's position. The State cites *State v. Durham*, 156 W.Va. 509, 195 S.E.2d 144 (1973), for example, for the proposition that a possibility of causing death is sufficient to prove guilt beyond a reasonable doubt. Amended Brief of Appellee, 16, 19-20, 23-24. The word "possibility," however, does not appear anywhere in the Court's opinion. The issue in *Durham* was not whether a possibility was sufficient to constitute guilt beyond a reasonable doubt. The issue instead involved the very different matter of pre-existing conditions and subsequent treatment. As explicitly stated by the Court, the issue in *Durham* was "whether an inflicted wound is the criminal cause of death where the wound would not have caused the death but for pre-existing physical disability and/or subsequent treatment." 156 W.Va. at 516, 195 S.E.2d at 148.

Furthermore, in *Durham* the medical experts could not say with certainty which of several conditions was the causative factor, but testified to the probability that one or the other triggered or accelerated the death. 156 W.Va. at 520, 195 S.E.2d at 150. Far from holding that a mere possibility is sufficient, however, the Court held that the crime must be established "by direct evidence or by cogent and irresistible grounds of presumption and that the death was not

due to natural or other causes in which the accused did not participate." 156 W.Va. at 519, 195 S.E.2d at 150. The Court reiterated that "a reasonable doubt as to such causation would prohibit a conviction." 156 W.Va. at 520, 195 S.E.2d at 150.

Similarly, in its brief the State repeatedly cites the *per curiam* opinion of *State v. Thompson*, 220 W.Va. 246, 647 S.E.2d 526 (2007), as authority for the proposition that the evidence is sufficient if the neglect "contributed" to a "foreseeable" death. Amended Brief of Appellee, 16, 17-18, 21, 23-24. The Court in *Thompson*, however, also specified that the neglect in that case led "inexorably" and "directly" to the child's death. 220 W.Va. at 254, 647 S.E.2d at 534. The neglect that led inexorably and directly to the child's death in *Thompson* was that the defendant left the child in a car, unattended, on a hot day until the child died of hyperthermia. 220 W.Va. at 248-49, 647 S.E.2d at 528-29. Consequently, in *Thompson* the evidence that the neglect caused the death was conclusively established beyond a reasonable doubt.

By contrast, there is no testimony in the present case that neglect led inexorably or directly to the child's death. The only evidence that neglect may have caused death in the present case is the medical testimony, cited in the Brief of Appellant, 14-15, which is expressed in terms of "chances" and "possibilities." This testimony falls far short of the inexorable and direct cause set forth in *Thompson*. Despite the representations of the State, the holding in *Thompson* instead supports the Appellant's position that the evidence of neglect causing death must contain something much stronger than chances and possibilities.

Additionally, in attempting to discredit the caselaw cited by the Appellant, the State distorts both the facts and the law in the authority cited in the Appellant's brief. For example, in its brief the State discusses the opinion in *Johnson v. State*, 121 S.W.3d 133 (Tex.App. 2003). The Appellant cited *Johnson* for its holding that a *chance* of resuscitation is not sufficient to

establish causation beyond a reasonable doubt. In the State's brief, the State attempts to distinguish *Johnson* from the present case by a distorted and misleading trivialization of its facts. The State asserts in its brief that "a mother noticed a problem with her daughter around 10:00 am," but that there was "no evidence that the appellant was aware of the child's serious injury." Amended Brief of Appellee, 26. (The matter is significant, because if the mother wasn't aware of the seriousness of the injury, the delay in obtaining prompt treatment is excusable.)

The actual problem that the mother noticed is described in the court's opinion. Although the state describes the problem as so minimal as to provide "no evidence that the appellant was aware of the child's serious injury," the exact words of the court are as follows: "Close to 10:00 am one morning, Appellant noticed that the child was not breathing and did not have a pulse." 121 S.W.2d at 134.

In addition to the trivialization of the child's injury in *Johnson* and the defendant's awareness of the injury, the State also misstates the evidence of causation in *Johnson*. In its brief, the State attempts to distinguish *Johnson* from the present case by describing what it claims to be "the complete lack of any testimony that the child would or even could have survived." Amended Brief of Appellee, 27.

In contrast to the State's assertion, the court in *Johnson* gives a detailed description of the testimony regarding whether the child could have survived. As the court stated, the child's emergency room physician testified that "the sooner a severely injured person receives medical attention, the better the chances of resuscitation, and that time is always a factor." 121 S.W.3d at 136. Additionally, the treating physician was unable to say how much time the appellant may have had in order to recognize the need for *live-saving treatment*, but contrary to the State's

assertions, the discussion of the time for "live-saving treatment" in itself is testimony that, with prompt treatment, the child in the *Johnson* case may have survived. 121 S.W.3d at 136.

The State's distortion of the facts of *Johnson* undermines the claims that the State makes in attempting to distinguish the opinion. Instead, the opinion stands for exactly the proposition that the Appellant asserts: that a *chance* of survival, had the parent sought medical treatment sooner, is not sufficient to constitute proof of causation beyond a reasonable doubt.

In addition, as part of its effort to discredit the published opinion cited by the Appellant in *Johnson*, the State cites the unpublished opinion of *State v. Fellers*, No. 13-08-688-CR, 2010 Tex. App. LEXIS 4792. (Both *Johnson* and *Fellers* are cases from Texas Courts of Appeals.) The State describes the *Fellers* case as "highly analogous" to the present case, including the assertion that (much like in the present case) *Fellers* involved delay in seeking treatment after a blunt force injury to the head. As the State asserts, "The medical examiner testified that blunt trauma caused the bruises to the child's forehead and directly caused the death." Amended Brief of Appellee, 25.

In fact, the *Fellers* case is not nearly as analogous as the State asserts. For example, contrary to the State's assertions, the injury that caused the death in *Fellers* was not trauma to the head (where, as in the present case, complex issues arise regarding the development of observable symptoms), but trauma to the abdomen. 2010 Tex. App. LEXIS 4792, at 2. The difference is significant, because as the medical examiner stated in *Fellers*, "from the time [the child] sustained this blunt-force abdominal trauma, he would have started exhibiting symptoms such as pain and vomiting." 2010 Tex. App. LEXIS 4792, at 2.

Factual errors aside, there are additional reasons for the Court to disregard the State's reliance on *Fellers*, including the State's implication that the Texas ruling in *Fellers* trumps the

Texas ruling in *Johnson*. The ruling in *Johnson* is a published opinion. The ruling in *Fellers* is not. The court in *Fellers* concluded its opinion by specifically stating "Do not publish." 2010 Tex. App. LEXIS 4792, at 7. The significance of non-publication is clear. As the Texas court states in Texas Rules of Appellate Procedure 47.7(a), "Opinions and memorandum opinions not designated for publication . . . have no precedential value . . ."

Because the court that issued the *Fellers* opinion is unwilling to give it any precedential value, this Court should disregard the portion of the State's brief that discusses it. Amended Brief of Appellee, 25-27.

The State concludes its brief with a discussion of caselaw from Minnesota. The Minnesota caselaw relied upon by the State contains the same deficiencies that exist throughout the State's brief. For example, the 2008 opinion in *State v. Shane*, No. A06-1581, 2008 Min.App. LEXIS Unpub. 245 (March 11, 2008), isn't analogous to the present case because, unlike in the present case, in *Shane* there was additional evidence of causation. As the court in *Shane* stated, in addition to delayed treatment there was "substantial evidence" that the defendant actually inflicted the injuries. 2008 Min.App.Unpub. LEXIS 245 at p. 4. But more significantly, as with the Texas opinion that the State relies on, the Minnesota opinion in *Shane* begins with the statement, "This opinion will be unpublished and may not be cited except as provided by Minnesota statutes." Among other restrictions, the applicable Minnesota statute provides that "Unpublished opinions of the Court of Appeals are not precedential." Minn. Stat. § 480A.08 (2009).

### **III. Misstatements of Fact Throughout the State's Brief Give a Distorted and Misleading Account of the Evidence in This Case.**

The misstatements of fact contained in the Amended Brief of Appellee are not limited to the discussions of caselaw, but instead include the facts of the present case itself. For example, the Amended Brief of Appellee states, with no citation, that "According to Dr. Chebib, these injuries were so severe Alex would likely have been *unconscious immediately . . .*" Amended Brief of Appellee, 21 (emphasis added). This statement is erroneous. Instead of testifying that Alex would have lost consciousness immediately (which would show a caregiver an immediate need for medical attention), the actual testimony of Dr. Chebib is very different. When asked about the time of losing consciousness, Dr. Chebib's actual response was:

A: It can be 24 to 48 hours.

Q: The child could have been --

A: He would start to deteriorate. You don't immediately lose consciousness. But you slowly start to deteriorate, you're unresponsive, you're sleeping, not waking up, you're not taking your bottle, becomes progressively worse within 24 to 48 hours.

Tr. 437-38.

The misstatements in the Amended Brief of Appellee are significant in this case because an essential element of the charge against the Appellant is the claim that she delayed in seeking medical treatment. An immediate loss of consciousness would show a caregiver an immediate need for medical treatment, constituting an element of the crime of neglect causing death. By contrast, a slow deterioration over 24 to 48 hours conveys a far different message to a caregiver, consistent with the Appellant's belief that the child was suffering from the effects of the flu.

Similarly, the Amended Brief of Appellee states that "the Appellant did not seek medical attention until Christina Carnell arrived Thursday evening (to a locked door and quiet apartment) discovering Alex unconscious, prompting the Appellant to call 911." Amended Brief of Appellee, 23. This description conveys the impression of a callous Appellant, disregarding an unconscious child until a friend discovered the unconscious baby and prompted the Appellant to call 911.

In fact, the record in this case demonstrates precisely the opposite, with the Appellant administering CPR and the Appellant urging Ms. Carnell to call 911, not the reverse. As Ms. Carnell herself testified, when she arrived at the apartment the Appellant was administering CPR and crying out "Tina, thank God you're here . . . Call 911." Tr. 296, 313.

In addition to the misstatements of facts, the Amended Brief of Appellee also contains significant statements of fact that are incomplete and misleading. For example, the Amended Brief of Appellee states "Det. Ferrell asked the Appellant, '[W]ere you afraid to take Alex to the hospital because of the bruise?' and the Appellant answered, 'Yes.'" Amended Brief of Appellee, 9. (Also see Amended Brief of Appellee, 2, 21-22, and 29.)

This assertion in the State's brief is misleading because it is incomplete. The actual answer of the Appellant was more than "Yes." As pointed out in cross-examination, according to counsel's notes of this specific meeting with Det. Ferrell, the actual answer that the Appellant gave to Det. Ferrell was "Yes, after Monday I thought he had the flu." Tr. 722-23.

The complete answer of the Appellant is significant, because the partial answer appears to be an admission of an essential element of neglect causing death. By contrast, the complete answer sets forth the opposite -- not an admission but, at least in part, an adamant denial.

With the overstated caselaw, non-precedential caselaw, misstatements and incomplete statements of fact removed from the State's brief, there is little or nothing that remains to support the State's assertion that evidence of a "possibility" of an essential fact is sufficient to sustain a criminal conviction. By contrast, the assertions contained in the Brief of Appellant are supported by constitutionally valid, precedential rulings. These rulings are consistent with the holding of the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 315 (1979), that the Constitution requires proof beyond a reasonable doubt for "every fact necessary to constitute the crime with which [a defendant] is charged."

**IV. The State's Distinction Between References to "CPS" and References to "CPS Proceedings" is Refuted by the Detailed and Unambiguous History of the Appellant's Motions and the Trial Court's Rulings in Limine.**

The State asserts in its Amended Brief of Appellee that the prosecution and its witness did not violate the trial court's ruling in limine, because the two statements to the jury about notifying "CPS" did not violate the trial court's order not inform the jury about "CPS proceedings." For numerous reasons, the distinction between referring to "CPS" (which the State argues is permissible), and "CPS proceedings," (which the State argues is impermissible), is spurious.

From the first week that counsel was appointed in this case, the Appellant repeatedly notified the State of the Appellant's continuous efforts to prevent information about CPS proceedings from reaching the jury. First, within five days of the Appellant's arrest, the Appellant filed a motion to prohibit both the State and its law enforcement agencies from making any further public statements about CPS that might reach potential jurors and interfere with the

Appellant's right to a fair trial. Motion to Compel Compliance With Prohibitions Against Prejudicial Pretrial Publicity, filed June 10, 2008.

Second, because of the hostility arising from law enforcement's public statements about this case, including disclosure of CPS involvement and the potential effect of these statements on the jury pool, the Appellant also filed a motion for a change of venue. The motion cited the extensive violations of the confidentiality of CPS proceedings and the resulting prejudice that had already occurred in this case. Motion for a Change of Venue, filed Dec. 30, 2008.

Third, prior to trial the Appellant filed a motion in limine to exclude testimony about CPS proceedings. Motion in Limine to Exclude Testimony About Civil Neglect or Abuse Proceedings, filed Dec. 30, 2008.

Finally, on the first day of trial, the Appellant argued the motion in limine, which the trial court granted. Tr. 14-16, 177-78. If the State found it necessary to refer to CPS proceedings for purposes of impeachment, the trial court directed the State to admonish all its witnesses to refer only to "other proceedings." Tr. 177.

The following morning, during opening statements, the State promptly violated the trial court's ruling by informing the jury that the State would call Dr. McCagg, a physician who the State asserted was so "angry" at the child's injuries that she asked that "CPS be contacted, Child Protective Services." Tr. 206. The Appellant promptly brought the violation to the trial court's attention in the form of a motion for a mistrial. Tr. 206-08. The trial court denied the mistrial but once again admonished the State, "Do not get into that." Tr. 208. Despite this second admonishment, the State then called Dr. McCagg herself, who promptly testified to precisely what the Appellant had objected to in the motion for a mistrial and to what the court had twice admonished the State to avoid. As Dr. McCagg testified to the jury, "By this point we had

already even notified CPS before we even arrived at the ICU." Tr. 339. The Appellant moved again for a mistrial. This second motion for a mistrial was denied. Tr. 339-41.

The State's asserts in its Amended Brief of Appellee that the State did not violate the trial court's ruling in limine because, the State claims, the two references to notifying "CPS" did not violate the trial court's order not to refer to "CPS proceedings." For numerous reasons, this distinction is groundless.

First, the initial violation, which resulted in a motion for mistrial and an admonition from the judge, was to precisely what the State is now claiming to be permissible: that is, a reference not to "CPS proceedings," but to "CPS" itself. Consequently, before the second violation occurred, if not before, the State knew precisely the scope of the Appellant's motion and the trial court's ruling. Second, the two references to notifying "CPS" were, in full effect, references to "CPS proceedings" because notification of CPS is the manner in which CPS proceedings begin. Third, to claim that informing the jury about "CPS" is permissible, but that notifying the jury about "CPS proceedings" is not would be the equivalent of stating that it would be permissible in civil trials to inform the jury about the involvement of the "insurer," as long as counsel didn't inform the jury about "insurance coverage." Rule 411, W.Va. Rules of Evidence (liability insurance); *Ellison v. Wood & Bush Co.*, 153 W.Va. 506, 518-23, 170 S.E.2d 321, 329-32 (1969).

For all these reasons, both instances where the jury was informed about CPS were clear violations of the trial court's ruling in limine and admonishment to the State. In addition, the second instance was also a violation of the trial court's admonishment after the first violation. The motions for mistrials in both instances should have been granted.

## CONCLUSION

For all of the above reasons, the Appellant urges that her conviction be set aside.

Respectfully submitted,

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By counsel

  
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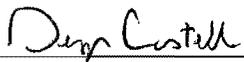
Counsel for the Appellant

Certificate of Service

I, George Castelle, do hereby certify that on the 9<sup>th</sup> day of August, 2010, I delivered a copy of the foregoing Reply of Appellant, by hand, upon:

C. Casey Forbes  
Third Year Law Student  
Rule 10 Admittee

Barbara H. Allen (Bar No. 1220)  
Managing Deputy Attorney General  
Office of the Attorney General  
State Capitol  
Charleston, WV 25305

  
\_\_\_\_\_  
George Castelle