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

**TEX B/ SIMMONS,**

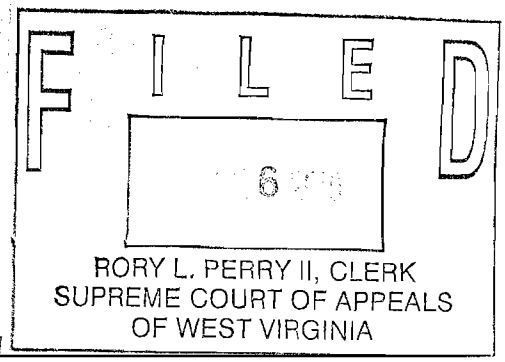
**Appellant.**

**v.**

**STATE OF WEST VIRGINIA**

**Appellee.**

**From the Circuit Court**
**Of Morgan County**
**No. 35540**




# REPLY BRIEF OF APPELLANT

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## RESPONSE TO THE CLAIM OF UNAVAILABILITY

The state in its brief alleges that a proper showing was made that the child declarant was an unavailable witness and therefore that testimony was admissible.

In reviewing the transcript of trial it appears that the declarant was available. In fact the direct and cross examination of the child took 19 pages of direct and cross examination.

The Child remembered that she was "raped" by Tex. She remembered that her mom told her that word. Tr. 11/18/08 p. 266. She remembered that it was Tex that was the reason that they had to move away. Tr. 11/18/08.

She remembered that she was interviewed by a nurse a Winchester and Martinsburg. Tr 11/18/08 p. 271. She remembered her school and softball field. Tr. 11/18/08 p. 263. She remembered that she lived in the house with Tex, Mom, Jay and Adam. Tr. 11/18/08 p.264.

She remembered what grade she was in and who her teachers were. Tr. 11/18/08 p. 264-264. She remembered that a man named Jeff, her mother's friend would come over. Tr. 11/18/08 p. 270.

What she didn't remember was the story the way the prosecutor wanted it to be told.

That is not unavailability. It took the state over two years to get the case to trial. The State's case suffered from the same frailty that all cases have. The recollection of witnesses are tricky things. Sometimes a witness remembers things better when they have had time to reflect on them. Some times they change their story because the first statement they gave was not the whole truth.

In this case the State got what it deserved. The honest recollection of a witness.

The State should not have the right to bolster the testimony of an alleged victim by the testimony of witnesses who wanted to take a statement of the victim for the purposes of preserving testimony. In *State v. Mechling,* 219 W.Va. 366, 633 S.E.2d 311 (2006) this court ruled that in the case where the statement is taken by a police officer it is easy to see that this is a testimonial statement. In other cases we must look facts and circumstances to see if they have the indicia of reliability and are testimonial.

In *Mechling* the court stated that the statement would be testimonial if it stated "what happened". at 379 Using the "what happened analysis it is clear that the testimony of the mother, and the nurse was the "what happened " kind of information.

## MOTHERS LACK OF MEMORY

Put together with the testimony of the child that the mother told her that the word for what happened to her was "rape" is the fact that the mother had proven faulty memory.

Allowing her to testify as to what the child told her was unfair to the defendant. The witness was unable to process information properly because of a brain injury. That was not her fault but it does call into question her ability to think rationally and remember things that happened in the past.

It is clear that the indicia or reliability with regard to the information is not there. The brain injury and lack of clear memory make the related statement suspect. People who have these kinds of injuries and problems can make up a plausible set of fact that accomplish their desired goals and not necessarily reflect the truth.

Rule 804 (b)(5) demands statements " having equivalent circumstantial guarantees of

trustworthiness". Where is the guarantee of trustworthiness? Testimony elicited from competent witness, including the mother show conclusively that her memory was flawed and that she could not be relied upon for accurate recollection.

The rule is violated when the witness cannot prove that he ability to report accurately is not compromised.

## CRAWFORD V. WASHINGTON

The United States Supreme Court in *Crawford v. Washington* 541 U.S. 36, 124 S.Ct.1334 (2004) states clearly that the use of an out of court statement made by an unavailable witness that is testimonial is barred unless the defendant has had the opportunity to cross examine that statement. The crucible of cross examination is the only way to determine the truthfulness of a testimonial statement. You have the opportunity to determine the credibility of the statement by a full and fair exchange between the witness and counsel.

This right of cross examination is not a right that is taken lightly. It is a right of constitutional proportion.

To suggest that the statement taken by the mother is not testimonial denies the teaching of *Crawford.* It was a statement that basically states what happened.

Cross examination of the statement is necessary to determine the accuracy of the declarant and not just the recollection of the testifying witness.

In this case we do not know what were the facts and circumstances surrounding the alleged statement by the child to the mother. Why did the mother recall the statement the way she did? Was it because she was mad at Tex. Was it because she wanted him out of the house?

We don't know. All we have is the recollection of the mother with a flawed mental state allegedly recalling what was told to her by her daughter.

We can't verify anything. If we only had the testimony of the child it would have survived a directed verdict of acquittal. It was the enhanced recollection of the mother and the nurse that convicted the defendant.

While this court has ruled that the statement to the forensic nurse was not testimonial the defendant would direct the court's attention to the holding in *Crawford* and *Meechling.*

In those two cases the court agree that some statements are not testimonial. If a person calls 911 and say my house is on fire that is generally not testimonial. Essentially it is the description that the declarant uses to explain a situation.

When the statement tells what happened it is testimonial. It relates the recollection of the declarant as to what took place at a time in the past. Those statements are made for a variety of reasons including improper one.

When the declarant uses the statement for an improper reason then the only way to get to the bottom of the statement is through cross examination. The finder of fact gets to see the facts and circumstances surrounding the statement.

Where the declarant makes the statement to a third party and then the third party then testifies then we have a second set of problems. That third part may have their own ax to grind. They may have reasons independent of the original declarant for telling a set of facts that are even more odious that the original declarant.

## FORENSIC NURSE

While this court has ruled that the forensic nurse in some instances is allowed to testify that rule is tempered by the fact that sometimes the nurse is performing in a capacity that insures reliability because of the patients need for an accurate diagnosis.

In this case the trip to the nurse was not made for the purpose of diagnosis it was made for the purpose of gathering evidence.

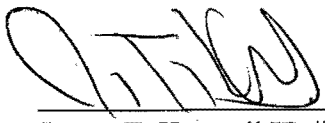
As was stated in the original brief there are differences in this case and *Payne.*

## CONCLUSION

A review of the facts and circumstances surrounding this case mandates that the defendant receive a new trial. The defendant was faced with the daunting task of trying to cross examine a witness who only gave a statement. That statement was first heard and refined by her mother and later that statement was admitted into evidence through the mother, forensic nurse and the police officer.

## PRAYER FOR RELIEF

Your Appellant would pray that this Court reverse his conviction and grant him a new trial..



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## CERTIFICATE OF SERVICE

I, James T. Kratovil, counsel for the Defendant, hereby certify that I have served a true and correct copy of the *appellants's Reply Brief* upon the following, by U. S. Mail, postage prepaid on this the 23rd day of August, 2010:

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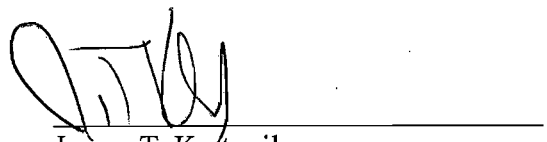

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