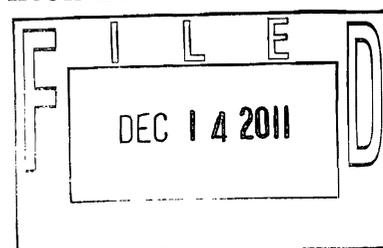


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THOMAS MCBRIDE, WARDEN,  
MOUNT OLIVE CORRECTIONAL  
COMPLEX,

Petitioner.

BRIEF FILED  
WITH MOTION



v.

Supreme Court No. 11-0853  
Circuit Court No.: 99-C-223  
(Putnam)

JOSEPH H. LAVIGNE, Jr.

Respondent.

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RESPONDENT'S BRIEF  
AND  
CROSS-ASSIGNMENT OF ERROR

---

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National District Attorneys Association/American Prosecutors Research Institute (2007), “Introducing Expert Testimony to Explain Victim Behavior In Sexual and Domestic Violence Prosecutions.” (p.11) (available at [pdf/http://ndaa.org/pdf/pub\\_introducing\\_expert\\_testimony.pdf](http://ndaa.org/pdf/pub_introducing_expert_testimony.pdf)) (last visited December 13, 2011).....22

National District Attorneys Association/American Prosecutors Research Institute. (2007), “Victim Responses to Sexual Assault: Counterintuitive or Simply Adaptive?” (p.9) (available at [pdf/http://ndaa.org/pdf/pub\\_victim\\_responses\\_sexual\\_assault.pdf](http://ndaa.org/pdf/pub_victim_responses_sexual_assault.pdf)) (last visited December 13, 2011) .....22,23

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## RESPONSE TO ASSIGNMENTS OF ERROR

- I. The Circuit Court Correctly Determined Joe Lavigne Was Convicted On Insufficient Evidence As A Rational Trier Of Fact Could Not Find Beyond A Reasonable Doubt That He Sexually Assaulted His Five-Year-Old Daughter KLL.
- II. The Circuit Court Correctly Determined The Trial Court's Instruction To The Jury That It Could Find Joe Lavigne Guilty On The Uncorroborated Testimony Of The Child Victim Was Erroneous And Denied Mr. Lavigne His Due Process Rights To A Fair Trial.
- III. The Circuit Court Correctly Determined The Trial Court's Ruling Allowing Only Four Character Witnesses To Testify Denied Joe Lavigne His Due Process Right To Present A Defense As Joe's Character And Credibility Were Key, Important Issues And This Restriction Improperly Limited His Ability To Raise A Reasonable Doubt As To His Guilt.

## STATEMENT OF THE CASE

Respondent Joe Lavigne (Joe) spent fifteen (15) years, from February 11, 1996, to May 5, 2011, incarcerated for a crime he did not commit. As petitioner indicates, Joe was convicted of the brutal, sexual assault<sup>1</sup> of his five-year old daughter KLL.<sup>2</sup> The Putnam County Circuit Court, however, in the habeas proceeding below, correctly determined (1) Joe was convicted on insufficient evidence because KLL testified at trial she did not know who the assailant was and her contradictory, out-of-court statements were not sufficient for a rational trier of the fact to find guilt beyond a reasonable doubt; (2) that the trial court therefore improperly instructed the jury that it could convict Joe on KLL's uncorroborated testimony; and (3) that the trial court improperly allowed only four character witnesses to testify on Joe's behalf when defense counsel

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<sup>1</sup> Joe was convicted of sexual assault in the first degree, child abuse resulting in serious bodily injury, and incest, and sentenced to a total of 20-50 years in prison. He was released on bond on May 5, 2011.

<sup>2</sup> Joe will use his daughter's initials, consistent with this Court's practice in these type cases.

had subpoenaed twelve. April 29, 2011, Order Vacating Judgment and Granting a New Trial (4/29/11 Order). (A.R. Vol. 1, 86).<sup>3</sup>

Joe's background and the circumstances of this crime make it extremely unlikely Joe could have committed it. Joe was 38, had never been in trouble before, came from a good family in which his father was a psychologist, had been married to his wife Jamie for eight (8) years, and was the father of three children, CLL, age 2, KLL, age 5 (time of offense), and ILL, age 8. (A.R. Vol. 8, 796, 802-03, 1120-21) (A.R. Vol. 6, 245). Joe was also in the Army for seven (7) years and served as a paratrooper in the 82<sup>nd</sup> Airborne and subsequently for about two years was in the West Virginia Air National Guard as a flight engineer on a C-130 airplane. (A.R. Vol. 8, 795-96). As the trial court commented at sentencing, with Joe's record, "it's just unbelievable." (A.R. Vol. 8, 1121). Hurricane police officer Ron Smith, the chief investigating officer in the case, even recommended Joe for probation. (A.R. Vol. 5, 224-26).

The day before KLL was assaulted, Joe played with his children, repaired and painted the kitchen door, and fixed the family washing machine. (A.R. Vol. 8, 807). That evening, Joe and his wife Jamie entertained two friends, Todd Ferguson and Janice Mullins, who left around midnight. Joe's two oldest children, ILL and KLL, watched movies that evening, and slept in the recreation room. (A.R. Vol. 8, 810-11).

According to Joe's and his wife Jamie's testimony, an intruder apparently entered one of their unlocked doors around dawn, carried KLL across the street and sexually assaulted her. Jamie was certain it was not Joe because she is a light sleeper and said Joe did not get out of bed prior to finding KLL in the bathroom after the assault. (A.R. Vol. 6, 286) (A.R. Vol. 7, 339).

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<sup>3</sup> The Appendix Record, agreed to by the parties, will be cited as: A.R. Vol. #, page #.

Once Joe and Jamie determined KLL had been injured, Joe called 911 and honestly reported that KLL thought he was the assailant. (A.R. Vol. 8, 817-18) (A.R. Vol. 5, 177). Jamie thought KLL was confused as KLL had mistakenly thought other men were Joe on several occasions. (A.R. Vol. 6, 289). Jamie also testified she would not protect Joe if she thought he did it. (A.R. Vol. 8, 791).

Hurricane police officer Ron Smith testified Joe was “perfectly cooperative” with the police during their investigation of this crime. (A.R. Vol. 7, 615). Joe requested that samples of his blood and pubic hair be taken and voluntarily gave his clothes for testing. (A.R. Vol. 7, 315, 615-16) (A.R. Vol. 5, 177-78, 248). However, as the circuit court below found, “there was no physical or forensic evidence that linked Joe to this crime.” (A.R. Vol. 1, 57). The circuit court indicated that the lack of any scratches, bruises, blood, or semen on Joe tends to exculpate him as KLL’s assault was extremely violent which left her “bloody and gaping.” (A.R. Vol. 1, 58). The court further stated that given the short time frame between the crime and its discovery, “Mr. Lavigne did not have the opportunity to commit the crime and still be clean of any evidence.” (A.R. Vol. 1, 58).

Another fact demonstrating Joe’s innocence is that KLL’s clothes were never found. After the assault, the assailant took KLL’s clothes and ran in a direction away from the Lavigne home towards St. Timothy’s Church. (A.R. Vol. 7, 531). The circuit court concluded it is unlikely Joe committed this crime because he would have had to hide KLL’s clothes so they could not be found, return to the home before KLL, as KLL said Joe was inside the house when she returned, and clean himself of any physical evidence. (A.R. Vol. 1, 58 n.30). Joe further consented to three or four police searches of his home for the clothes. The police also did

extensive searches of the area around the Lavigne home for the clothes. (A.R. Vol. 7, 533, 605-10) (A.R. Vol. 8, 880).

After the assault, KLL gave three different contradictory statements regarding the identity of the assailant. As the circuit court correctly found, KLL told some people (Joe, her mother Jamie, Officer Ron Smith) that her “daddy” was the assailant (A.R. Vol. 1, 74) (A.R. Vol. 8, 815-16) (A.R. Vol. 7, 686, 535-36); told others (Dr. Joan Phillips, Dr. Kimberly Martin, and paramedic Franklin Humphreys) the assailant “looked like” my daddy (A.R. Vol. 1, 73) (A.R. Vol. 6, 205) (A.R. Vol. 7, 505, 680); and still others (Officer Ron Smith, Dr. Joan Phillips, Dr. Kimberly Martin, and Trooper Donna Ashcraft) that she did not know her assailant. (A.R. Vol. 1, 74) (A.R. Vol. 6, 205-07) (A.R. Vol. 7, 665-66, 684). KLL’s statements to Ron Smith on February 13, 1996, and to Trooper Donna Ashcraft on April 14, 1996, that she did not know her assailant were videotaped and played at trial. (A. R. Vol. 6, 205-07) (A.R. Vol. 7, 665-66, 684) (State’s Exhibits 21 and 24).

KLL’s description of her assailant also is inconsistent with Joe’s description. KLL said her assailant had black hair, black peachy skin, and a little black hair on his chin (A.R. Vol.6, 206,231, 257-263); that the assailant’s skin was darker than Joe’s skin (A.R. Vol. 7, 321-23); and that the assailant’s hair was like Joe’s before he (Joe) cut it recently. (A.R. Vol. 7, 321-22) (A.R. Vol. 8, 770-71).

KLL further gave contradictory statements regarding the assailant’s clothes. KLL told Dr. Phillips, Dr. Martin, and paramedics Stover and Humphreys that the assailant wore green pants. (A.R. Vol. 6, 254, 206) (A.R. Vol. 7, 463) (Pet. Exh 3, 4, 5, 7). By contrast, paramedic Stover heard KLL tell her mother Jamie the assailant’s pants “were just like daddy has on.” (A.R.Vol. 7, 426). Joe was wearing black sweatpants. (A.R. Vol. 8, 819) (A.R. Vol. 7, 377,

382) (A.R. Vol. 5, 248). KLL also said her assailant was wearing a gray sweatshirt with little black marks on it. (A.R. Vol. 6, 206) (A.R. Vol. 7, 535). Officer Ron Smith confirmed at the habeas evidentiary hearing that Joe gave the police the gray sweatshirt he was wearing and that it does not have black marks on it. (A.R. Vol. 5, 218) (Pet. Exh. 11).

At trial, KLL confirmed her pretrial statements that she did not know the identity of her assailant. When asked at trial who her assailant was, KLL testified, “I don’t know.” (A.R. Vol. 6, 253). When asked who the assailant “looked like,” KLL did not give a verbal response, but pointed at Joe. (A. R. Vol. 6, 263). KLL further testified that when she ran home after the assault Joe was inside the house. (A. R. Vol. 6, 259). When KLL was asked if she had seen the assailant before, the court reporter inserted into the transcript that KLL “turned slightly in chair and looked at [Joe].” (A.R. Vol. 6, 253).

The circuit court correctly determined that KLL’s in-court testimony was insufficient for conviction because KLL said she did not know the identity of her assailant and her statement Joe looked like or resembled the assailant is not a positive identification sufficient for a rational trier of fact to find guilt beyond reasonable doubt. (A.R. Vol. 1, 71). The circuit court further ruled it would not consider KLL’s supposed glance at Joe when asked if she had seen her assailant before as it was improper for the court reporter to take such interpretive liberties with the record; but even if such a look occurred it is not sufficient evidence for conviction, particularly in view of KLL’s testimony she did not know the assailant’s identity. (A.R. Vol. 1, 73).

The circuit court further correctly concluded that KLL’s contradictory, out-of-court statements were insufficient for conviction as a rational trier of fact could not find guilt beyond a reasonable doubt where that is the only evidence before it. (A.R. Vol. 1, 80). The court indicated that the reason for such a rule is that “the risk of convicting an innocent accused is simply too

great when the conviction is based entirely on prior inconsistent statements.” (A.R. Vol. 1, 80) (citation omitted). The circuit court further rejected the State’s argument that KLL’s mother Jamie pressured KLL into changing her story. The circuit court correctly found “that KLL’s story changed multiple times both in and out of the presence of her mother, and without pressure from her mother.” (A.R. Vol. 1, 82).

The circuit court further correctly determined the jury was improperly instructed it could find Joe guilty on the uncorroborated testimony of KLL and could find Joe guilty if they believed KLL’s testimony beyond a reasonable doubt. (A.R. Vol. 1, 49). The circuit court found this instruction improper because KLL’s in-court testimony that she did not know the identity of the assailant and that Joe resembled the assailant was insufficient as a matter of law for a rational trier of the fact to find Joe guilty beyond a reasonable doubt. (A.R. Vol. 1, 41, 48-49).

The circuit court further determined this jury instruction mislead the jury to believe KLL’s contradictory, out-of-court statements could be considered testimony since the instruction did not distinguish between the two. (A.R. Vol. 1, 50). Secondly, the circuit court found the instruction misleading because the instruction mislead the jury to believe KLL’s testimony was sufficient for conviction when it was not. As the circuit court observed, most of KLL’s testimony was beneficial to Joe, but the instruction essentially told the jury it was just the opposite and denied Joe the benefit of inferences favorable to the defense. (A.R. Vol. 1, 50-51).

Finally, the circuit court correctly determined that Joe was denied his constitutional right to present evidence in his defense when the trial court only permitted four (4) character witnesses to testify on Joe’s behalf when he had subpoenaed twelve (12). (A.R. Vol. 1, 54-55). At his trial, Joe testified to his innocence, his love for KLL, and his complete cooperation with law enforcement since the beginning of the case. (A.R. Vol. 8, 794, 803, 881). Joe’s character as a

loving father, his propensity for non-violence, and his credibility were therefore important issues for the jury to consider. (A.R. Vol. 1, 54-55).

As the circuit court noted, this is particularly true under the circumstances of this case since there was no physical evidence that linked Joe to the crime and no corroborating evidence that supported KLL's out-of-court statements that the assailant was her father. (A.R. Vol. 1, 54). Thus, as the circuit court stated, "[w]ith no other evidence to argue, other than there was no evidence, Mr. Lavigne was left to argue his good character." (A.R. Vol. 1, 54).

The jury did hear four witnesses testify to Joe's reputation for being honest, law-abiding and a good, nurturing parent. (A.R. Vol. 8, 936, 940, 952-53, 963). The circuit court, however, properly determined the trial court's ruling limiting him to only four character witnesses "robbed Mr. Lavigne of an opportunity to prove his character, which was an important fact in the case[.]" (A.R. Vol. 1, 54). The circuit court further determined the trial court's ruling "limited [Joe's] ability to raise a reasonable doubt as to his guilt." (A.R. Vol. 1, 55).

### **SUMMARY OF ARGUMENT**

The circuit court correctly ruled that Joe Lavigne's convictions were not supported by sufficient evidence. KLL testified she did not know the assailant. KLL's out-of-court statements implicating Joe were contradicted by other statements indicating the assailant resembled Joe, and that she did not know the assailant. The circuit court correctly concluded a rational trier of fact could not find guilt beyond a reasonable doubt from this evidence. In addition, KLL's description of the assailant is inconsistent with Joe's description at the time of the crime. Finally, the circuit court concluded that given the circumstances, it is unlikely Joe committed this crime. No physical evidence linked Joe to the crime and the assailant took KLL's clothes, which were never found despite several extensive searches by the police.

The circuit court further correctly determined Joe was denied his due process rights to a fair trial by the trial court's instructions to the jury it could find Joe guilty on the uncorroborated testimony of KLL if they believed her testimony beyond a reasonable doubt. The circuit court properly ruled this instruction legally erroneous because KLL testified she did not know the assailant. This instruction misled the jury (1) to believe KLL's contradictory, out-of-court statements could be considered testimony, and (2) to believe KLL's testimony was sufficient for conviction when it was actually beneficial to Joe. This improper instruction relieved the State of its burden of proving the element of identity beyond a reasonable doubt.

The circuit court also correctly determined Joe was denied his due process rights to present a defense by the trial court's decision to only allow him to present four character witnesses when he had subpoenaed twelve to testify on his behalf. Since no evidence corroborated KLL's contradictory, out-of-court statements implicating Joe, Joe's character for honesty, for being a loving father, and propensity for being law-abiding and non-violent, as well as his credibility, were very important facts for the jury to consider.

Evidence of good character may create a reasonable doubt of guilt. In only permitting four character witnesses to testify, the trial court improperly deprived Joe of the opportunity to prove his character and thereby limited his ability to present a defense which could raise a reasonable doubt as to his guilt.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Since the circuit court's Order is well-reasoned and the issues were correctly and authoritatively decided, oral argument is unnecessary in this case. In addition, the case may be decided pursuant to Rule 21 via a memorandum decision as it involves a review of the lower court's appropriate analysis of the sufficiency of evidence for conviction, an improper jury

instruction that was unsupported by the evidence, and an arbitrary limitation of the number of character witnesses at trial.

## ARGUMENT

### **I. The Circuit Court Correctly Determined Joe Lavigne Was Convicted On Insufficient Evidence As A Rational Trier Of Fact Could Not Find Beyond A Reasonable Doubt That He Sexually Assaulted His Five-Year-Old Daughter KLL.**

When the trial court sentenced 38 year-old Joe Lavigne (Joe), the court acknowledged Joe came from a good family, was honorably discharged from the Army after seven (7) years of service, and that “if you look at the record, this is the only crime that he has been convicted of. Its just unbelievable.” (A.R. Vol. 8, 1120-21). The trial court’s comment is accurate because Joe is actually innocent of this horrendous crime committed on his five-year-old daughter KLL. Despite Joe’s good background and character evidence from witnesses that he was an honest, good, loving father to his three children, his complete cooperation with law enforcement, he and his wife Jamie’s testimony he was innocent, and the lack of any physical evidence linking Joe to the crime, Joe was nevertheless convicted of this crime.

The circuit court below, however, correctly determined Joe was convicted on insufficient evidence because (1) KLL’s testimony at trial that she did not know the identity of her assailant actually exonerated Joe; and (2) that Joe was convicted on KLL’s contradictory, out-of-court statements. (A.R. Vol. 1, 71-84). KLL’s description of the assailant also is inconsistent with Joe’s description at the time. The circuit court further indicated that considering all the circumstances, it is unlikely Joe committed the crime. (A.R. Vol. 1, 58).

Barbara Allen, Managing Deputy for the Attorney General’s Office, was Joe’s trial attorney and testified at the habeas evidentiary hearing she was convinced KLL believed Joe was

not the assailant, (A.R. Vol. 5, 72), that KLL told her and her investigator Joe was in the house when the assault occurred (A.R. Vol. 5, 70), and told the trial court at sentencing that Joe was convicted on the “weakest case I have ever seen.” (A.R. Vol. 8, 1118).

Standard Of Review And Constitutional Error.

The State correctly indicates this Court applies a three prong standard of review in reviewing challenges to the findings and conclusions of a circuit court in a habeas corpus action. See Brief of Petitioner (hereafter State’s Brief) 2-3.

The State, however, indicates the Court will not review the sufficiency of evidence in a habeas case except in extraordinary circumstances, citing Cannellas v. McKenzie, 160 W.Va. 431, 437, 236 S.E.2d 327, 331 (1977). The State is incorrect. Two years after Cannellas, the United States Supreme Court decided Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979), a case the State fails to cite. Jackson sets the constitutional standard for reviewing sufficiency of evidence claims which is “the threshold necessary to guarantee the fundamental protection of due process of law.” (A.R. Vol. 1, 56) (quoting Jackson, 443 U.S. at 319, 99 S.Ct. at 2789). That standard is whether there is sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson, 443 U.S. at 324, 99 S.Ct. at 2792. This is the standard adopted by the Court in State v. Guthrie, 194 W.Va. 657, 461 S.E. 2d 163 (1995), and followed by the circuit court below. (A.R. Vol. 1, 55).

Contrary to the State’s assertions, State’s Brief 30-31, this standard does not mean, as the circuit court below noted (A.R. Vol. 1, 57), that “if there is any evidence whatsoever on each of the crime’s elements, the reviewing court must affirm.” Rather, “all of the evidence presented must be considered,” id., in deciding whether a rational trier of fact could find all the elements beyond a reasonable doubt.

In Jackson, the Supreme Court found that “a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt[.]” Jackson, 443 U.S. at 317, 99 S.Ct. at 2788. That is what occurred in this case.

The Circumstances Surrounding This Crime Point to Joe’s Innocence.

As Joe’s character witnesses related, Joe was a good parent and family man who loved and nurtured his three children, ILL, age 7, KLL, age 5, and CLL, age 1. (A.R. Vol. 8, 952-53). According to Joe’s wife Jamie, Joe had a great relationship with KLL and said, “[h]e’s a wonderful dad.” (A.R. Vol. 7, 340). The day KLL was assaulted, Joe was busy at home fixing the family washing machine and painting the back door to their home. (A.R. Vol. 8, 807). That evening, he and his wife Jamie entertained two friends, Todd Ferguson and Janice Mullins, playing a board game while the children watched a movie. (A.R. Vol. 8, 810). Their friends left around midnight and the children slept in the recreation room. (A.R. Vol. 8, 811).

According to Joe and his wife Jamie, both of whom testified to Joe’s innocence, an intruder must have entered their home (doors were always unlocked), carried KLL across the street, and brutally, sexually assaulted her. Jamie testified she is a light sleeper and Joe did not get out of bed prior to getting up and finding KLL in the bathroom. (A.R. Vol. 6, 286) (A.R. Vol. 7, 339). When Joe summoned Jamie to the bathroom, Joe was in his underwear. (A.R. Vol. 7, 311, 339). Jamie said KLL’s genitals were red, she saw a dark substance, and thought it was diarrhea so she put KLL in the tub and when Jamie saw it was blood pulled her out and determined KLL had been injured. (A.R. Vol. 6, 281-85). The State’s assertion that Jamie “placed the child in a bathtub arguably with the intent to destroy evidence,” State’s Brief 16, 34, after the discovery of the assault is ridiculous and unsupported by the evidence. Upon discovery

of the injury, Joe instinctively went outside to look for the assailant, returned, called 911, and candidly stated that KLL thought he was the assailant. (A.R. Vol. 8, 816) (A.R. Vol. 5, 177).

According to the police, Joe was “perfectly cooperative” with them. (A.R. Vol. 7, 625). Joe not only voluntarily gave the police his clothes for testing, but asked to give and gave blood and pubic hair samples. (A.R. Vol. 7, 613, 615) (A.R. Vol. 5, 178, 248). Additionally, as the circuit court found, “there was no physical or forensic evidence that linked Mr. Lavigne to this crime.” (A.R. Vol. 1, 57).

There were no scratches, bruises, scrapes, blood, or semen found on him. As the defense has argued, given the extreme violence of this sexual assault which left KLL bloody and gaping, and given where the sexual assault occurred, in a parking lot, the fact that there was no physical or forensic evidence whatsoever tends to exculpate Mr. Lavigne as KLL’s assailant.

In other words, in the short time between the perpetration of the crime and its discovery Mr. Lavigne did not have the opportunity to commit this crime and still be completely clean of any evidence.

(A.R. Vol. 1, 58).

Although the circuit court found the State was entitled to the inference Joe had the opportunity to complete the crime, the court stated “[t]his is unlikely given the circumstances of this case, though. For Mr. Lavigne to grab KLL’s clothes, run away from the house, hide KLL’s clothes in such a manner as they would never be found, return to the house before KLL [again KLL has routinely stated that Mr. Lavigne was inside the house when she returned], and to clean himself so as to not have any physical evidence on him, is unlikely.” (A.R. Vol. 1, 58).

Joe further cooperated with the police in their efforts to find KLL’s clothes which were taken by the assailant. Joe voluntarily consented to at least three or four police searches of his home for KLL’s clothes. (A.R. Vol. 7, 533, 608-10) (A.R. Vol. 8, 880). The police also did a “grid search” of the areas around Joe’s home, including the garage and family car but found no

evidence of either KLL's clothes or any other evidence linking Joe to the crime. (A.R. Vol. 7, 605-10).

The Circuit Court Correctly Determined That KLL's In-Court Testimony Was Not Sufficient For a Rational Trier of Fact to Find Guilt Beyond A Reasonable Doubt Because KLL Testified She Did Not Know The Identity Of Her Assailant.

As indicated in the circuit court's opinion, A.R. Vol. 1, 59-60, KLL testified:

- Q. [KLL], remember you told the Judge and Ms. Allen and everybody that you were going to tell us what happened. And we need to know, really, who did this to you? Do you remember?
- A. I don't know.
- Q. You don't know? Have you ever seen him before?
- A. [( ) Whereupon, the witness turned slightly in chair and looked at the defendant.)

Trial Tr. Vol. 1, 253 [A.R. Vol. 6, 253].

- Q. [After the assault when you ran home]..., [KLL], where was your mommy?
- A. She was inside.
- Q. Where was your brother, [ILL]?
- A. He was inside sleeping.
- Q. Where was your little brother, [CLL]?
- A. Inside.
- Q. Where was your daddy?
- A. Inside.
- Q. Everybody was inside, and then you ran in the house. Did you take a minute and lie back down beside [ILL]?
- A. (Shaking head no.)

*Id.* at 259 [A.R. Vol. 6, 259].

- Q. ...Do you remember who that person that hurt you looked like?...
- A. (Whereupon, witness looked over her right shoulder and pointed to the Defendant.)
- Q. Like your daddy?
- A. (No response.)

*Id.* at 263 [A.R. Vol.6, 263].

Because KLL affirmatively stated she did not know the identity of her assailant, the circuit court correctly concluded a rational trier of fact could not find guilt from this statement.

(A.R. Vol. 1, 73). Her testimony actually exonerates Joe because when asked where her daddy was, KLL answered “inside.” (A.R. Vol. 6, 259). The circuit court further correctly concluded that KLL’s testimony indicating her father resembled her assailant was insufficient for conviction. (A.R. Vol. 1, 71-72). Even the prosecutor conceded this evidence was insufficient for conviction when defense counsel made that argument in moving for acquittal and the prosecutor stated, “I agree with you there.” (A.R. Vol. 8, 1016-17).

Finally, the circuit court indicated it would not consider KLL’s alleged turning in her chair and looking at Joe when re-asked if she knew her assailant due to the court reporter’s taking inappropriate interpretive liberties in putting that in the record. (A.R. Vol. 1, 72). Such a look, even if it occurred, can be interpreted many ways and simply does not communicate that KLL is identifying Joe as her assailant, particularly in light of her affirmative testimony she did not know the identity of her assailant. For example, because KLL said she did not know the identity of her assailant, she could have been looking to Joe as her parent because she did not know the answer to the question. Or she may have been looking to Joe for emotional support in this situation, which was obviously trying for her because, as the circuit court noted, she “shut down” on cross-examination. (A.R. Vol. 1, 59). In any event, the circuit court correctly held such a supposed look, even if considered, “is insignificant because KLL affirmatively stated that she did not know the identity of her assailant.” (A.R. Vol. 1, 73). Thus, the circuit court correctly found “KLL’s testimony alone was not enough to sustain a conviction beyond a reasonable doubt.” (A.R. Vol. 1, 73).

The State argues that KLL’s courtroom testimony, when considered in conjunction with her out-of-court statements, provided sufficient evidence for the jury to conclude Joe was the assailant. State’s Brief 33. Joe disagrees. As will be shown below, KLL’s statements were

contradictory and required a trier of fact to essentially guess as to which of her inconsistent out-of-court statements, which were not subject to cross-examination, were correct. A rational trier of fact cannot find guilt beyond a reasonable doubt if they must literally guess or speculate as to which contradictory, out-of-court statement by the witness to credit.

KLL Made Contradictory, Out-Of-Court Statements Regarding The Identity Of Her Assailant, His Description, And The Description Of His Clothes.

The State argues sufficient evidence supports Joe's conviction because "[t]he evidence in the case indicates that the victim had clearly identified [Joe] as the perpetrator." State's Brief 32. The State's characterization of the record is inaccurate because KLL's statements regarding the identity of her assailant are quite contradictory. KLL initially told Joe, her mother Jamie, and Officer Ron Smith that her daddy was the assailant. (A.R. Vol. 1, 74). However, KLL subsequently told Ron Smith, Dr. Kimberly Martin, Dr. Joan Phillips, and Trooper Donna Ashcraft she did not know who the assailant was. (A.R. Vol. 7, 666, 684, 710) (A.R. Vol. 6, 207). For example, in a videotaped interview in the hospital on February 13, 1996, KLL told State Trooper Donna Ashcraft she did not know her assailant. (State's Exhibit 21) (A.R. Vol.7, 710). In a videotaped interview on April 14, 1996, KLL also told Officer Ron Smith she did not know the assailant and had not seen him before. (State's Exhibit 24) (A.R. Vol. 7, 666).

KLL also told Dr. Joan Phillips, Dr. Kimberly Martin, and paramedic Franklin Humphreys that the assailant "looked like" her daddy. (A.R. Vol. 1, 73). KLL also told her mom Jamie the assailant looked like other people. (A.R. Vol. 8, 734-35, 757-58). Thus, since KLL made a number of conflicting statements regarding the identity of her assailant, it cannot be concluded beyond a reasonable doubt she clearly identified Joe as her attacker.

In addition, KLL's mother Jamie indicated KLL had a history of mistaking other men for Joe. KLL's mother testified that on at least three occasions KLL had confused another person with Joe. (A.R. Vol. 7, 314-15). For example, on one occasion Todd Ferguson, a friend, read KLL a bedtime story when she was sleepy and the next morning KLL swore it was her daddy who read her the story. (A.R. Vol. 6, 289).

Moreover, the State fails to acknowledge in its brief that KLL's statements regarding her assailant's description are completely inconsistent with Joe's physical description. For instance, as noted by the circuit court, A.R. Vol. 1, 55, 57, KLL testified the assailant had black hair and hair on his chin. (A.R. Vol. 6, 257-63). KLL also told Dr. Phillips the assailant had black peachy skin, and a little black hair on his chin. (A.R. Vol. 6, 206, 231). KLL further told her mother Jamie that the assailant's skin was darker than Joe's skin. (A.R. Vol. 7, 321-23); and that the assailant's hair was like Joe's before he [Joe] cut it recently. (A.R. Vol. 7, 321-22) (A.R. Vol. 8, 770-71).

The State also fails to mention that KLL gave contradictory statements in describing the assailant's clothes. KLL testified at trial, and previously told Dr. Phillips, Dr. Martin, and paramedics Stover and Humphreys, that the assailant wore green pants. (A.R. Vol. 6, 254, 206) (A.R. Vol. 7, 463) (A.R. Vol. 5, 132, 140, 147, 173) (Pet. Exh. 3, 4, 5, 7, Habeas Evidentiary Hearing (Hab. E.H.)). Paramedic Stover, however, testified KLL's mother Jamie questioned KLL about her statement that the assailant's pants were green and KLL responded, "no mommy, they were just like daddy has on." (A.R. Vol. 7, 426). Joe had on black sweatpants that morning, which he later gave to the police. (A.R. Vol. 8, 819) (A.R. Vol. 7, 377, 382) (A.R. Vol. 5, 248).

Further, the State does not mention that KLL also said her attacker had on a gray sweatshirt with little black marks on it (A.R. Vol. 6, 206) (A.R. Vol. 7, 535), and that Officer

Ron Smith testified that the gray sweatshirt Joe had on that morning and gave to police does not have black marks on it. (A.R. Vol. 5, 216, 218) (Pet. Exh. 11, Hab. E. H.).

In addition to KLL's young age and immaturity, another contributing factor to the discrepancies and the unreliability of KLL's identification of her assailant is that she was lying face down on her stomach when the sexual assault occurred, making it impossible for her to see her attacker's face. (A.R. Vol. 7, 665-66). There also is no evidence as to how long she was awake or how sleepy she was prior to the sexual assault when the assailant carried her across the street.

Given KLL's above contradictory statements regarding her assailant's identity, and the above discrepancies between KLL's description of her attacker and Joe, a rational trier of fact could not find beyond a reasonable doubt Joe was her assailant.

The Circuit Court Correctly Determined That Contradictory, Out-Of-Court Statements By The Accuser, Standing Alone, Are Insufficient To Uphold A Conviction.

The circuit court found the evidence in this case insufficient because "the only evidence before the jury on the question of the identity of KLL's assailant were prior, contradictory out-of-court statements made by a five-year old child following a very traumatic event." (A.R. Vol. 1, 81). In reaching this legal conclusion, the circuit court relied principally on the reasoning of Beber v. State, 887 So. 2d 1248 (Fla. 2004), and United States v. Bahe, 40 F. Supp. 2d 1302 (D.N.M. 1998).

In Beber, the defendant was convicted solely on the victim's videotaped pretrial statement describing a sexual act by the defendant as the victim's testimony at trial contradicted the videotaped statement. Id. at 1252. In reversing Beber's conviction, the Florida Supreme Court cited State v. Moore, 485 So.2d 1279 (Fla. 1986), and State v. Green, 667 So.2d 756 (Fla.

1995), in which the court held that “a prior inconsistent statement standing alone is insufficient to prove guilt beyond a reasonable doubt.” Beber, 887 So. 2d at 1252 (quoting Moore, 485 So.2d at 1281). The court noted the Moore “Court agreed that ‘the risk of convicting an innocent accused is simply too great when the conviction is based entirely on prior inconsistent statements.’” Id. (quoting Moore, 485 So.2d at 1281). It would violate the defendant’s Sixth Amendment right to confrontation and cross-examination. Id. Thus, Beber’s analysis requires a conclusion that KLL’s prior inconsistent hearsay statements implicating Joe are insufficient to sustain his convictions.

The federal district court in New Mexico reached the same conclusion in United States v. Bahe, 40 F.Supp.2d 1302, 1303 (D.N.M. 1998), where the defendant’s conviction rested solely on the victim’s prior out-of-court statements which were contradicted by the victim’s trial testimony.<sup>4</sup> The court indicated that it reviewed well over 100 cases involving child sexual abuse and was unable to find a single case in which the conviction was upheld on such little evidence. Id. at 1305. As the circuit court below indicated in its order, A.R. Vol. 1, 78-79, the Bahe court stated:

In cases in which an inconsistent out-of-court statement was admitted as substantive evidence of the charged sexual acts and no other evidence was presented, state and federal courts have nearly uniformly concluded that there was insufficient evidence to support the conviction.” *See United States v. Drake*, 1995 WL 935006 (Navy-Marine Corps. Crim. App. 1995) (unpublished opinion); *Brower v. State*, 728 P.2d 645, 646-48 (Alaska App. 1986); *Acosta v. State*, 417 A.2d 373, 375-77 (Del. 1980) (conviction aff’d. for acts testified to in-court, rev’d for acts for which only out-of-court statements were presented); *Lowe v. State*, 668 So.2d 274, 275 (Fla.App.1996); *Anderson v. State*, 655 So.2d 1118, 1119-20 (Fla.1995); *State v. Green*, 667 So.2d 756, 760-61 (Fla. 1995); *State v. Werneke*, 958 S.W.2d 314, 317-20 (Mo.App. 1997) (judgment of acquittal entered on counts for which only inconsistent out-of-court statements presented,

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<sup>4</sup> The 11-year-old victim said in a pretrial statement that the defendant put his finger in her vagina, but testified at trial the defendant did not touch her in a sexual manner. Id. at 1303.

judgment aff'd. as to counts on for which complaining witness actually testified); *State v. Pierce*, 906 S.W.2d 729, 733-37 (Mo.App.1995); *State v. White Water*, 194 Mont. 85, 634 P.2d 636, 637-39 (Mont. 1981); *State v. Ramsey*, 782 P.2d 480, 482-84 (Utah 1989); *see also United States v. Orrico*, 599 F.2d 113 (6<sup>th</sup> Cir. 1979) (check fraud conviction based only on prior inconsistent statement rev'd); *In re Miguel*, 32 Cal.3d 100, 105-107, 185 Cal.Rptr. 120, 649 P.2d 703 (1982) (conviction for burglary rev'd where based only on recanted out-of-court statement); *State v. Maestas*, 92 N.M. 135, 584 P.2d 182 (N.M.App. 1978) (conviction for physical abuse of child rev'd where only evidence presented was out-of-court statement); *State v. Robar*, 157 Vt. 387, 601 A.2d 1376 (Vt. 1991) (burglary conviction based only on prior inconsistent statement rev'd); *State v. Sexton*, 115 Wis.2d 697, 339 N.W.2d 367 (Wis.App.1983) (published in table only; conviction for operating vehicle without license based solely on unsworn statement rev'd).

Bahe, 40 F.Supp.2d at 1307.

Moreover, the Bahe court said “the majority of state courts to address the issue have gone so far as to adopt a per se rule that a prior inconsistent statement, recanted at trial, is alone insufficient to support a conviction.” Id. at 1308 (citing nine (9) state cases). After reviewing the courts that had not adopted a per se rule, the Court opined:

All of these courts have recognized that a conviction based solely on an inconsistent, un-sworn and uncross-examined out-of-court statement runs contrary to the most basic premise of our criminal justice system. Long ago the Supreme Court expressed its fear that the admission of unsworn, prior inconsistent statements ‘would allow men to be convicted on unsworn testimony of witnesses – a practice which runs counter to the notions of fairness on which our legal system is founded.’ Bridges v. Wixon, 326 U.S. 135, 89 L.Ed. 2103, 65 S.Ct. 1443, p. (1945)[.]

Id. at 1309.

The Bahe court further explained that the primary problem with basing a conviction on nothing more than an out-of-court statement which is contradicted by the witness’s trial testimony “is that the fact finder has no logical basis for determining which statement is true and may even be falsely persuaded by the presentation of the out-of-court statement.” Bahe, 40

F.Supp.2d at 1310. The circuit court in this case found “particularly informative” the following quote from Bahe:

When a trier of fact decides to believe a witness’ prior out-of-court assertions rather than that same witness’ present in-court contradiction of those earlier remarks, that decision often is based solely on guess or intuition, not credible facts. This inherent danger is compounded when that prior inconsistent statement is the only prosecution evidence against the accused and becomes the sole basis for conviction.

Id. (quoting Stanley Goldman, Guilt by Intuition: The Insufficiency of Prior Inconsistent Statements to Convict, 65 N.C.L. Rev. 1, 2 (1986). (A.R. Vol. 1, 79-80).

In reversing Bahe’s conviction, the court found the victim’s out-of-court statement alone, which was neither corroborated nor demonstrated to be reliable, insufficient to establish beyond a reasonable doubt that Bahe committed the alleged crimes. Id. at 1311. The Court agreed with the Florida Supreme Court in State v. Green, 667 So.2d at 761, that “the risk of convicting an innocent accused is simply too great when the conviction is based entirely on prior inconsistent statements.” Bahe, 40 F.Supp.2d at 1310.

The circuit court reached the same conclusion in this case. (A.R. Vol. 1, 80-81). Thus, the circuit court correctly concluded that “no rational trier of fact can find proof of guilt beyond a reasonable doubt when the *only* evidence before it are prior contradictory, out-of-court statements of the accuser. (A.R. Vol. 1, 80) (emphasis in original).

It is significant that the State, neither in the lower court, nor in its brief in this Court, has challenged the circuit court’s legal conclusion that contradictory, out-of-court statements alone are insufficient to uphold the conviction in this case. See A.R. Vol. 1, 74. Instead, the State argues KLL was pressured by her mother Jamie and intimidated into changing her story. State’s Brief 34. The circuit court correctly rejected this argument, stating, “the evidence does not support the assertion that Ms. Lavigne actually pressured KLL into changing her story. The

record shows KLL's story changed multiple times, both in and out of the presence of her mother, and without pressure from her mother." (A.R. Vol. 1, 81-82).<sup>5</sup> In addition, KLL's mom's discussions with her five-year old child regarding Joe being the assailant should be seen as nothing more than a concerned parent trying to correct her child she knows is mistaken about something very important. KLL's mom's reaction as a parent was a natural one. KLL's mom Jamie further made it clear she would not protect Joe if she thought he was the assailant. . (A.R. Vol. 8, 791).

Moreover, the State's assertion that KLL's mom used her position to intimidate and pressure KLL to not identify [Joe] as the assailant, State's Brief 34, certainly cannot be true with respect to KLL's testimony at trial. After August 1996 until the trial in November 1997, KLL lived in Maryland with relatives and not with her mother. (A.R. Vol. 8, 1008). Further, according to Officer Ron Smith, KLL's mom Jamie cooperated with him, made KLL available to the police for interviews, told KLL Officer Smith was a good guy, and that she (KLL) should talk to him. (A.R. Vol. 7, 629) (A.R. Vol. 8, 981). Thus, KLL's mom in no way tried to pressure KLL "to remain silent" as the State contends. State's Brief 34.

Accordingly, contrary to the State's arguments, State's Brief 34, the jury could not rationally conclude KLL was victimized by the circumstances of not receiving parental support and being pressured by her mom to not disclose the identity of the assailant.

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<sup>5</sup> The circuit court discussed two instances that would even suggest Ms. Lavigne was pressuring KLL. The first was when KLL was receiving treatment in the ambulance and the second was in the hospital when Dr. Phillips interviewed KLL a second time. On both occasions, Ms. Lavigne told KLL the assailant could not be Joe and KLL told her mom he was. During the initial hospital interview when her mom was not present, KLL told Dr. Phillips she did not know who the assailant was. Thus, the circuit court correctly concluded "KLL continually changed her story, even outside the presence of her mother[,]” so Ms. Lavigne was not the reason KLL changed her story. (A.R. Vol. 1, 82-83).

The State further argues that because Joe admitted on the 911 call his daughter thought he did it, he must be guilty. State's Brief 35. If Joe was the assailant, why in the world would he call 911 and tell that to the operator? Joe's actions and those that followed, demonstrating his complete cooperation with the police, were not those of a guilty person.

Finally, the State argues that KLL identified her father as the assailant because she did not go to her parent's bedroom immediately after the assault. State's Brief 35. Such a simplistic argument completely overlooks many factors that could affect a traumatized child's behavior. For example, KLL may have felt ashamed or embarrassed by what happened which would have made her reluctant to immediately disclose it. "Disclosure [the act of telling another about being sexually abused] can be a scary and difficult process for children." The National Child Traumatic Stress Network. "What To Do If Your Child Discloses Sexual Abuse: Information for Parents and Caregivers." April 2009 (p.1) (available at <http://nctsn.org/nctsn/assets/pdfs/caring/disclosure.pdf>) (last visited on December 13, 2011). Moreover, as a national prosecutor's association recognizes, "[s]exual and domestic violence victims behave in individual, multi-faceted, and complex ways. Their behaviors, therefore, cannot be reduced to simple terms." National District Attorneys Association/American Prosecutors Research Institute. (2007). "Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions." (p.11) (available at [http://ndaa.org/pdf/pub\\_introducing\\_expert\\_testimony.pdf](http://ndaa.org/pdf/pub_introducing_expert_testimony.pdf)) (last visited on December 13, 2011). Thus, contrary to the State's argument, "[a]s there is nothing normative about being sexually victimized, there can not be a 'normal' reaction to such a traumatic event." National District Attorneys Association/American Prosecutors Research Institute. (2007). "Victim Responses to Sexual Assault: Counterintuitive or Simply Adaptive?" (p.9) (available at

[http://www.ndaa.org/pdf/pub\\_victim\\_responses\\_sexual\\_assault.pdf](http://www.ndaa.org/pdf/pub_victim_responses_sexual_assault.pdf).) (last visited on December 13, 2011).

Several Deficiencies In The Police Investigation In This Case Quite Possibly Resulted In Their Failing To Find The Real Assailant.

There were further several deficiencies in the police investigation which quite possibly resulted in their failure to find the real assailant. Probably the worst example of this inadequate investigation is the police's failure to dust either the front or back doors of the Lavigne home for fingerprints. When the paramedics arrived at the Lavigne home, the front door was open and the screen door was propped open with a brick. (A.R. Vol. 7, 592). The paramedics even noted in their report that the front door could be dusted for fingerprints. (A.R. Vol. 5, 132) (Pet. Exh. 3, Hab. E.H.). Unfortunately, Officer Ron Smith chose not to do so because he said the material on the outside door was wrought iron and not printable. (A.R. Vol. 7, 592) (A.R. Vol. 5, 185-86). On cross-examination at trial, however, Smith admitted the surface of the outside door handle was smooth. (A.R. Vol. 7, 594-96). Smith further chose not to dust the back door for fingerprints, even though the door had been painted the evening before, because too many people had been in and out that door. (A.R. Vol. 7, 590). Smith, however, admitted there was only a small number of people that had touched the door that day and therefore those people could be excluded. (A.R. Vol. 7, 591).<sup>6</sup>

Officer Richard Gillespie also talked with KLL and prepared a composite drawing from her description of the assailant. (A.R. Vol. 7, 628) (A.R. Vol. 5, 207-09). See A.R. Vol. 5, 77 (Pet. Exh. 2, Hab. E. H., A.R. Vol. 3, 645). Officer Smith testified the composite represented

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<sup>6</sup> The police further failed to cordon off the crime scene area next to the church parking lot across the street from the Lavigne home which could have easily been contaminated by churchgoers arriving shortly after the police did. (A.R. Vol. 7, 584-85).

what KLL thought the assailant looked like. (A.R. Vol. 7, 632). Nevertheless, the police did nothing with the composite and did not send it to other police departments. (A.R. Vol. 7, 641) (A.R. Vol. 5, 209-10).

There is further strong evidence the police lost important evidence – two towels and two washcloths which accompanied KLL to the hospital, collected by hospital personnel, and released to Officer Smith, were never again found. (A.R. Vol. 7, 574 ) (Stipulation, A.R. Vol. 5, 170-71) (A.R. Vol. 5, 173) (Pet. Exh. 7, Hab. E.H.). Smith claimed he never received them. (A.R. Vol. 7, 574) (A.R. Vol. 5, 197-98). The towels and washcloths that had been used on KLL and collected by hospital personnel potentially contained the perpetrator’s bodily fluids or DNA had they been available for testing. Officer Smith did acknowledge that two wet washcloths that had been used on KLL were improperly packaged in a plastic bag, contrary to proper evidence collection procedures. (A.R. Vol. 5, 194).

Further, Officer Smith or his colleagues did not interview or investigate any of the registered sex offenders in Putnam County. Smith merely looked at the list, a couple pages of names, with Sergeant Stevenson of the State Police for a familiar name or similar crime and because he saw nothing that would alarm him, he didn’t investigate any of these persons further. (A.R. Vol. 7, 619-20). Joe’s wife, Jamie Loughner-Lavigne, also gave Officer Smith the names of 15-20 people she thought should be interviewed, but he only followed up on three of them. (A.R. Vol. 7, 642-52, 672-73). The Lavigne’s belonged to the Society for Creative Anachronisms (SCA), a group of medieval reenactors, and frequently had people from that group in their home. Jamie told Officer Smith that Susan West kept the list of SCA members but Smith never contacted her. (A.R. Vol. 7, 646-47).

Finally, the police failed to adequately investigate Mark Berry, then accused of murder, and against whom Joe and Jamie were scheduled to testify. (A.R. Vol. 7, 650). State Trooper Donna Ashcraft testified that Mark Berry was on electronically monitored home confinement on the date of the crime and there were no alarms. (A.R. Vol. 7, 706-07, 712). As indicated in the Lincoln County Circuit Court records in Berry's case, Ashcraft's testimony was false as Berry's home confinement was not electronically monitored. (A.R. Vol. 5, 257) (Pet. Exh. 13, Hab. E.H.) (Stipulation, A.R. Vol. 5, 256-57).

**II. The Circuit Court Correctly Determined The Trial Court's Instruction To The Jury That It Could Find Joe Lavigne Guilty On The Uncorroborated Testimony Of KLL Was Erroneous And Denied Mr. Lavigne His Due Process Rights To A Fair Trial.**

As the circuit court properly found, the trial court's instruction, that Joe could be convicted on KLL's uncorroborated testimony, was not supported by KLL's testimony, was erroneous factually and legally, and effectively relieved the State from proving the essential element of the identity of the offender. (A.R. Vol. 1, 41-51).

The trial court's instruction stated:

The Court instructs the jury that a conviction for any sexual offense may be obtained on the *uncorroborated testimony* of the victim, unless such testimony is inherently incredible.

Thus, if you believe the testimony of [KLL] beyond a reasonable doubt you may return a verdict of guilty under the indictment.

(A.R. Vol. 8, 1032) (emphasis added). See A.R. Vol. 1, 39-40. This instruction was taken from Syl. Pt. 5, State v. Beck, 167 W.Va. 830, 286 S.E. 2d 234 (1981) (" A conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible, the credibility is a question for the jury."). This Court has also held that

jury instructions must be a correct statement of the law and be supported by the evidence. Syl. Pt. 4, in part, State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995).

In this case, the circuit court correctly determined “this jury instruction was not appropriate because KLL’s *trial* testimony did not identify her assailant. In fact, KLL *testified* that she did not know the identity of her assailant.” (A.R. Vol. 1, 41) (emphasis in original). Specifically, when KLL was asked by the prosecutor if she remembered who hurt her, she testified, “I don’t know.” (A.R. Vol. 6, 253). KLL further testified Joe was inside the house when the assault occurred. (A.R. Vol. 6, 259). Although when KLL was asked “who did it [the assailant] look like,” she pointed at Joe, even one of the prosecutors agreed that was insufficient for conviction when defense counsel objected to the court’s giving the instruction:

MS. ALLEN [defense counsel]: The Defendant objects. [T]his Instruction is simply inapplicable to this case because it presupposed that there was actually testimony from the victim, whether corroborated or not, that tended to inculcate the Defendant. This case is all about out-of-court statements by the child, not about anything she said in Court. And if only her testimony were to be considered, the Court would have directed a verdict at the end of the State’s case because she testified she did not know who did this to her.

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MR. MORRISON [prosecutor]; ... She didn’t say “Daddy did it”, but she looked at him when the question was asked. The jury can reasonably infer that that’s what she meant in the way of an answer.

MS. ALLEN: When she was asked did she know who did it, her answer was “No.” Then she was asked, “Who did it look like?” And she turned around and she pointed at the Defendant. Now, that’s not enough to carry the case to the jury.

MS. MORRISON: I agree with you there.

(A.R. Vol. 8, 1014-17).

The circuit court agreed this was insufficient evidence for conviction:

\*\*\*The fact that she may have pointed to her father when asked who the assailant resembled is of little or no consequence because when her testimony is taken as a whole, KLL testified that she did not know the identity of her assailant. Even assuming, *arguendo*, that the only testimony in the case at bar as to identity was

KLL's non-verbal affirmative testimony that the assailant resembled the defendant; this would still not be enough. One has not identified their assailant by saying that they resemble the defendant. This is not identification as required to give the instruction. But as stated supra, KLL affirmatively stated that she did not know the identity of her assailant. Therefore, giving the instruction was inappropriate.

(A.R. Vol. 1, 48-49).

The circuit court further found that KLL's supposed glance at Joe when asked if she had seen her assailant before, even assuming, *arguendo*, it occurred,<sup>7</sup> "is not a positive identification. It is nothing more than a look." (A.R. Vol. 1, 49).

Therefore, even assuming that the look happened, it is still uncontradicted that KLL did not testify that her father was her assailant: indeed, when KLL's testimony is read together and taken in context, one can see that KLL did not know the identity of her assailant. All we know for sure is that her assailant resembled her father, but that KLL did not know the identity of her assailant. Simply put, this is not enough to warrant a jury instruction that tells a jury it can find the defendant guilty based upon uncorroborated identification testimony of the victim.

(A.R. Vol. 1, 49).

Thus, the record simply does not support the State's argument that "the record is clear that based on the child's testimony a jury could very well conclude that the child in many ways identified her father as the perpetrator of the crime." State's Brief 21. The State further argues that KLL's testimony must be considered in conjunction with her statements to others that Joe was the assailant and that the circuit court refused to consider these statements to others. State's Brief 24. That is not, however, what the instruction says. The instruction told the jury it could convict on KLL's testimony alone: "... if you believe the testimony of [KLL] beyond a reasonable doubt you may return a verdict of guilty..." (A.R. Vol. 8, 1032).

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<sup>7</sup> The circuit court concluded the look did not occur. (A.R. Vol. 1, 48).

The State also contends the circuit court's legal analysis indicates the Beck instruction could only be given if the child's testimony addressed each element of the crime. State's Brief 24. That is because that is what the instruction says. Therefore, there is a "reasonable likelihood" a juror would interpret the instruction that way. Boyde v. California, 494 U.S. 370, 380, 110 S.Ct. 1190, 1198 (1990).

In State v. Beck, 167 W.Va. at 831-32, 286 S.E.2d at 236-37, the defendant was convicted of sexual assault in the first degree involving his 10 year-old step-daughter. At trial, two witnesses testified for the State, the victim and her mother. The young victim testified she performed oral sex on the defendant. Her mother testified the girl reported the incident to her. Id. at 832, 286 S.E.2d at 237. On appeal, the defendant challenged his conviction because it was based on the uncorroborated testimony of the victim. The Supreme Court rejected this argument, indicating it has "consistently followed the majority position that '[a] conviction for 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.'" Id. at 843, 286 S.E.2d at 242 (quoting Syl. Pt. 4, State v. Green, 163 W.Va. 681, 260 S.E.2d 257 (1979)). See also Syl. Pt. 1, State v. Beacraft, 126 W.Va. 895, 30 S.E.2d 541 (1944), *overruled on other grounds*, State v. Dolin, 176 W.Va. 688, 347 S.E.2d 208 (1986), *overruled on other grounds*, State v. Edward Charles L., 183 W.Va. 641, 398 S.E.2d 123 (1990).

Unlike the victim's testimony in Beck and in Beacraft, KLL's trial testimony did not support the instruction authorized by those cases. By giving this instruction, the trial court was effectively telling the jury KLL's testimony was sufficient to satisfy the elements of the crimes charged when it clearly was not. Thus, the challenged instruction in this case was neither a correct statement of the law nor supported by the evidence. See Syl. Pt. 4, Guthrie, 194 W.Va.

657, 461 S.E.2d 163. See also Ludy v. State, 784 N.E.2d 459, 462 (Ind. 2003) (“To expressly direct a jury that it may find guilt based on the uncorroborated testimony of a single person is to invite it to violate its obligations to consider all the evidence.”). Accord Brown v. State, 11 So.3d 428, 439 (Fla. App. 2009) (holding such an instruction “constitutes an improper comment on the evidence.”); Veteto v. State, 8 S.W.3d 805, 816 (Tex. Crim. App. 2000), *abrogated on other grounds by State v. Crook*, 248 S.W.3d 172 (Tex. Crim. App. 2008) (same).

“Jury instructions are reviewed by determining whether the charge reviewed as a whole sufficiently instructed the jury so they understood the issues involved and were not misled by the law.” Id. at 671, 461 S.E.2d at 177 (quoting State v. Bradshaw, 193 W.Va. 519, 543, 457 S.E.2d 456, 480 (1995)). “It is reversible error to give an instruction which is misleading and misstates the law applicable to the facts.” Syl. Pt. 5, State v. Wyatt, 198 W.Va. 530, 482 S.E.2d 147 (1966).

The State argues the jury instruction did not mislead the jury. State’s Brief 20. The State is incorrect. The instruction misleads the jury in several ways. First, as stated by the circuit court, “this instruction could and most likely did mislead the jury to conclude that [KLL’s] contradictory, out-of-court statements could be considered testimony[]” since the trial court’s instructions “did not distinguish for the jury the difference between what KLL said in her trial testimony vis a vis what she said to other people before trial. Therefore, the uncorroborated testimony instruction could and most likely did confuse the jury.” (A.R. Vol. 1, 50).

Secondly, the second part of the instruction mislead the jury into believing KLL’s testimony was sufficient to establish the elements of the offense and thus for conviction, when the evidence was to the contrary. As the circuit court found, “[t]his instruction leaves the indelible impression that none of KLL’s testimony was beneficial to Mr. Lavigne, when in fact

the majority of her testimony was beneficial to him.” (A.R. Vol. 1, 50). For example, as noted by the circuit court, KLL testified she did not know her assailant’s identity (A.R. Vol. 6, 253); her assailant ran away from her house toward St. Timothy’s Church when he ran away (A.R. Vol. 1, 58 n.30) (A.R. Vol. 8, 984) (State’s Exh. 23) (A.R. Vol. 7, 530-31); and her father [Joe] was inside the house when she returned. (A.R. Vol. 6, 259). “When this testimony is reviewed through the light of this instruction, it becomes clear Mr. Lavigne was deprived of important inferences that would be beneficial to his defense.” (A.R. Vol. 1, 51).

This testimony tends to exculpate Mr. Lavigne and is actually beneficial to his defense. However, the jury is being instructed that if they believe KLL’s testimony, which includes that she did not know who her assailant was, and that Mr. Lavigne was still inside when she returned home from the sexual assault, then they could find Mr. Lavigne guilty. This instruction stripped Mr. Lavigne of any exculpatory evidence that could be gleaned from KLL’s testimony.

Id. As the Indiana Supreme Court said in Ludy, 784 N.E.2d at 462, where it found the same instruction erroneous, “[j]urors may interpret this instruction to mean that baseless testimony should be given credit and that they should ignore inconsistencies, accept without question the witness’s testimony, and ignore evidence that conflicts with the witness’s version of events.”

Thus, the trial court’s instruction unconstitutionally relieved the State of its burden to prove the element of identity beyond a reasonable doubt. See State v. O’Connell, 163 W. Va. 366, 368, 256 S.E.2d 429, 431 (1979) (“In a criminal prosecution, it is constitutional error to give an instruction which supplies by presumption any material element of the crime charged.”). Accord Sandstrom v. Montana, 442 U.S. 510, 520-21, 99 S.Ct. 2450, 2457-58 (1979). Therefore, the circuit court correctly held “that this instruction deprived Mr. Lavigne of his constitutional right to a fair trial.” (A.R. Vol. 1, 51). U.S. Constitution, Amend. XIV; W.Va. Constitution, Article III, §10.

Finally, the State asserts that the circuit court has taken the issue of determining KLL's credibility from the jury and usurped the jury's authority by concluding KLL's testimony is no benefit to the State. State's Brief 26-27. Joe disagrees. The circuit court really did not make any determination as to the credibility of KLL's testimony, but rather concluded that it clearly did not implicate Joe. Trial judges make determinations like that all the time in ruling on whether there is sufficient evidence to support a particular jury instruction.

**III. The Circuit Court Correctly Determined The Trial Court's Ruling Allowing Only Four Character Witnesses To Testify Denied Joe Lavigne His Due Process Right To Present A Defense As Joe's Character And Credibility Were Key, Important Issues And This Restriction Improperly Limited His Ability To Raise A Reasonable Doubt As To His Guilt.**

The right of a defendant to compulsory process to call witnesses in his defense is a fundamental right guaranteed by the Sixth Amendment to the U.S. Constitution and Article III, § 14 of the W.Va. Constitution. Syl. Pt. 2, State v. Whitt, 220 W.Va. 685, 649 S.E.2d 258 (2007). The United States Supreme Court has designated it "a fundamental element of due process of law." Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923 (1967). See also In re Oliver, 333 U.S. 257, 273, 68 S.Ct. 499, 507-08 (1948) (recognizing that a defendant's "opportunity to be heard in his defense — a right to his day in Court — are basic to our system of jurisprudence, and these rights include, as a minimum, a right. . .to offer testimony[.]"). Accord Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 1045 (1973); Crane v. Kentucky, 476 U.S. 683, 690-91, 106 S.Ct. 2142, 2146-47 (1986). The circuit court correctly ruled Joe was denied that right in this case when the trial court limited his defense to four character witnesses when defense counsel had subpoenaed twelve to testify on Joe's behalf. (A.R. Vol. 1, 54-55) (A.R. Vol. 8, 933).

In West Virginia, “rulings on the admissibility of evidence are largely within the sound discretion of a trial court[,]” State v. Riley, 201 W.Va. 708, 714, 500 S.E.2d 524, 530 (1997), and the court’s rulings will be reversed only where there is an abuse of discretion. Id. Under Rule 403, WVRE, the trial court may exclude evidence if the probative value of the evidence is substantially outweighed by, *inter alia*, the needless presentation of cumulative evidence. Id. It is true as the State argues that some courts put limits on the number of character witnesses. State’s Brief 27. However, as the circuit court below stated, A.R. Vol. 1, 53, this Court, in State v. Jenkins, 195 W.Va. 620, 629, 466 S.E.2d 471, 480 (1995), held that the rules of evidence should not be applied in such a mechanistic way as to prevent a defendant from being heard in his defense. Moreover, the circuit court noted that “Justice Franklin Cleckley, a preeminent legal scholar and jurist,” “[i]n commenting on the limitation of the number of character witnesses,” stated,

It has been widely recognized that the trial court has the right, in the exercise of sound and reasonable judicial discretion, to limit the number of character or reputation witnesses except in a few cases where the character of a party in a civil action, or of an accused in a criminal prosecution, was in issue or one of the material and important facts in the case. Franklin D. Cleckley, Handbook on Evidence for West Virginia Lawyers, Volume 1, §4-4(D) (8), pg. 4-103 (4<sup>th</sup> ed.).

(A.R. Vol. 1, 52-53).

In this case, the trial court’s limiting the defense to the presentation of only four character witnesses was arbitrary, unreasonable, and an abuse of discretion, Further, the probative value of the additional character witnesses was not substantially outweighed by the needless presentation of cumulative evidence. Joe was charged with the brutal, sexual assault of his five-year-old daughter. There can be little doubt the jury’s sympathies lie with KLL in this case and unless Joe could prove he was not the type of person that was capable of committing these offenses, he would likely be convicted. Other than his actions demonstrating his innocence and

complete cooperation with the police on the day of KLL's assault, Joe had little else to defend himself with other than his character, good name, reputation in the community, and credibility before the jury. This was noted by the circuit court below:

In the case at bar, Mr. Lavigne's character as a loving father with a propensity for nonviolence were important facts for the jury to consider. The case against Mr. Lavigne was built around one piece of evidence, KLL's out-of-court, hearsay statements that her assailant was either her father or looked like her father. *See* Trial Tr. Vol. 3, 1046 [A.R. Vol. 8, 1046] (in the State's closing arguments, it commented to the jury "[r]emember why we're here. Do you doubt [KLL]? That's the whole question"). There was no physical evidence that linked Mr. Lavigne to the crime and there was no corroborating evidence that supported KLL's statements that her assailant was either her father or looked like her father. With no other evidence to argue, other than there was no evidence, Mr. Lavigne was left to argue his good character.

(A.R. Vol. 1, 54). *See Seymour v. State*, 30 S.E. 263 (Ga. 1898) ("There are cases where, owing to the peculiar circumstances in which a man is placed, evidence of good character may be all he can offer in answer to a charge of crime."). Thus, how the jury viewed Joe's character and credibility was of the utmost importance to his defense.

Moreover, given the unreliable evidence upon which the State's case rested, the additional character witnesses<sup>8</sup> could have actually made a difference in the outcome of the trial because, as the circuit court concluded, the limitation to four improperly limited Joe's ability to raise a reasonable doubt as to his guilt:

In limiting the number of character witness to only four the trial court robbed Mr. Lavigne of an opportunity to prove his character, which was an

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<sup>8</sup> The testimony of Joe's character witnesses (Charles Selby, Steven Burke Kimble, Mark Lambourne, Frederick Ray Sayre) indicated, *inter alia*, they had known Joe for several years, that Joe had a reputation for being law abiding and scrupulously honest (A.R. Vol. 8, 936, 940, 963); that his reputation is "sterling"- extremely friendly, courteous, polite, very well mannered (A.R. Vol. 8, 947); that he is a very nurturing, good parent and had an extremely positive reputation as a law abiding person with high ethics. (A.R. Vol. 8, 952-53). Joe was going to present at the habeas evidentiary hearing the additional character witnesses the trial court excluded but the circuit court said that was unnecessary as the court said it would assume they would all provide favorable character evidence for Joe. (A.R. Vol. 4, 17-25).

important fact in this case; specifically, Mr. Lavigne's general character as a loving father and his propensity for nonviolence. As the West Virginia Supreme Court of Appeals has stated, "[e]vidence of good character and exemplary life may of itself create a reasonable doubt of the guilt of a person accused of crime. It is an important factor to be considered in passing upon the credibility of the evidence of the accused." *State v. McDermott*, 99 W.Va. 220, 128 S.E. 108 (1925). When the trial court limited Mr. Lavigne to only four character witnesses, it improperly limited his ability to raise a reasonable doubt as to his guilt. Therefore, this Court finds that the trial court denied Mr. Lavigne the constitutional right to produce evidence in his defense.

(A.R. Vol. 1, 54-55).

Most jurisdictions recognize "[t]he principle or rule that a trial court has the right, in the exercise of a sound and reasonable judicial discretion, to limit the number of character or reputation witnesses." B.H. Glenn, Annotation, Propriety and Prejudicial Effect of Trial Court's Limiting Number of Character or Reputation Witnesses, 17 A.L.R.3d 327, § 3a (1968 & Supp. 2011). This ALR annotation further notes there is an exception "in a few cases where the character of a party to a civil action, or of an accused in a criminal prosecution, was in issue or one of the material and important facts in the cause." (footnote omitted). *Id.* See also 75 Am.Jur.2d Character Evidence § 259 (2007) ("Although it is proper for a trial court to place reasonable limits on the number of witnesses allowed to testify with respect to the character or reputation as to a material, specific trait in both civil and criminal cases, this discretion should be exercised with caution in a criminal case and governed by the importance of the testimony. A limit on the number of character witnesses is not authorized where character is an important fact or issue in the case." (footnotes omitted)).

For example, in *State v. Padgett*, 93 W.Va. 623, 628, 117 S.E. 493, 495 (1923), this Court reversed the conviction of the defendant for operating a moonshine still when the court only allowed the testimony of two witnesses as to his reputation in the community and refused to permit the testimony of six other witnesses on the same issue. Ruling that the court's refusal to

permit the additional testimony as to the defendant's good character was prejudicial error, this Court stated:

The language of Judge Cooley in *People v. Garbutt*, 17 Mich. 9, as follows is pertinent: 'Good character is an important fact with every man; and never more so than when he is put on trial charged with an offense which is rendered improbable in the last degree by a uniform course of life wholly inconsistent with any such crime. There are cases when it becomes a man's sole dependence, and yet it may prove sufficient to outweigh evidence of the most positive character.'

Id. In State v. Moyer, 58 W.Va. 146, 52 S.E.30 (1905), the Court also emphasized the importance of character evidence to a criminal defendant:

'Character is of importance in this: it may of itself, in spite of all evidence to the contrary raise a reasonable doubt in the minds of the jury, and so produce an acquittal. An honest man may, through malice or otherwise, be charged with crime, and his life or liberty be endangered by fallacious circumstances or perjury, and he may be able to produce no evidence to prove his innocence except his own oath; and if, in such case, a blameless life and unstained character are of no avail — are a mere makeweight in a doubtful case — his condition is a sad one.'

Id. at 152-53, 52 S.E.2d at 33 (quoting Hanney v. Commonwealth, 9 A. (Pa.) 339 (1987)).

Similarly, in Julian v. State, 215 S.E.2d 496 (Ga. App. 1975), the Georgia Court of Appeals, found reversible error when the trial court limited the defendant to five out of twenty-five character witnesses in a prosecution for possession and sale of heroin. The Court pointed out that the defendant relied largely on evidence of his good character, the State relied on the testimony of a former narcotics officer, and "that ultimately the jury would be forced to believe one witness and reject the testimony of the other before a verdict could be reached." Id. at 597. "Thus, the proffered [character] testimony became of crucial importance to the defendant." Id. The Court further noted that the question at issue was one of credibility and "that evidence of good character is substantive and may of itself by the creation of a reasonable doubt produce an acquittal." Julian, 215 S.E.2d at 597. The Court concluded that "[l]imiting character evidence . . . to less than two percent of total trial time [10 pages out of a trial transcript of over 600] would

seem unduly restrictive[.]” Id. at 598. Accord Leverett v. State, 93 So. 347, 351 (Ala. App. 1922) (Court found trial court’s refusal to permit more than six character witnesses to be reversible error where character of defendant was one of the main facts at issue and “of the utmost importance” as it “may of itself generate in the minds of the jury a reasonable doubt of defendant’s guilt.”); Jones v. State, 497 So.2d 215, 226 (Ala. App. 1986); Spivey v. State, 143 S.E. 450 (Ga. App. 1928); Willis v. State, 104 So. 141 (Ala. App. 1925).

Likewise, Joe Lavigne’s character and credibility were of the utmost importance in the jury’s consideration of his plea of innocence. To convict Joe, the jury had to find he was not telling the truth and additional character witnesses certainly could have made a difference in the jury’s evaluation of his character and credibility. Its probative value was not substantially outweighed by the needless presentation of cumulative evidence. Rule 403, WVRE. Furthermore, Joe’s four character witnesses only consumed 30 pages of a trial transcript of over 1,000 pages, less than 3 % of the total trial. This stingy restriction of Joe’s character evidence which was so critical to his defense was arbitrary, unreasonable and an abuse of discretion.

The State’s suggestion that character evidence has little bearing on whether someone is a sex offender because some members of the clergy are convicted of sex crimes, State’s Brief 28, does not diminish the importance of character evidence, particularly if the person, like Joe in this case, is innocent. The State wants to apply a presumption of guilt to everyone charged with a sex crime and then contend character evidence is irrelevant. Fortunately, our system of justice does not work that way. Defendants are presumed innocent, the jury is entitled to hear relevant evidence that may raise a reasonable doubt as to guilt, and the importance of such evidence in each case must be considered. In a case like this one, where the State’s case is based solely on

contradictory, out-of-court statements, the defendant's character evidence becomes extremely important as opposed to a case where its importance is not so apparent.

The State further argues trial courts are invested with discretion to limit the number of character witnesses so that the "true issues" in the case will not be "obscured or confused." State's Brief 29. If one of the most important issues in the case is the defendant's character and credibility, as it was here, how can that issue be obscured, or confused, or how would it be a waste of time, to allow the jury to hear more than a few witnesses on that issue?

Finally, contrary to the State's argument, this is not a situation where this Court is being asked to second guess the trial court as to the number of character witnesses to be allowed in a given situation. State's Brief 29. Each case must be considered on its particular circumstances. The real issue is whether the trial court in this case unreasonably interfered with Joe's right to present a defense by limiting the number of character witnesses to four. In State v. Blake, 197 W.Va. 700, 705, 478 S.E2d 550, 555 (1996), Justice Cleckley wrote that when an "error precludes or impairs the presentation of a defendant's best means of a defense, we will usually find the error had a substantial and injurious effect on the jury." That is what occurred here.

Even in several cases where the appellate court found the trial court's limitation of character witnesses to be within its discretion, the defendant was permitted to call more character witnesses than Joe was permitted in this case. See, e.g., United States v. Greenlee, 517 F.2d 899, 906 (3<sup>rd</sup> Cir. 1975) (13 character witnesses); United States v. Sullivan, 803 F.2d 87, 89 (3<sup>rd</sup> Cir. 1986) (51 character witnesses); Orrell v. State, 154 P.2d 779, 788 (Okl. Cr. App. 1945) (10 character witnesses); State v. Elftman, 226 P.2d 795, 802 (Kan. 1924) (10 character witnesses); Carr v. State, 208 So.2d 886, 889 (Miss. 1968) (11 character witnesses); Mayo v. Georgia, 582 S.E.2d 482, 485 (Ga. App. 2003) (12 character witnesses); State v. Webster, 431 S.E.2d 808, 814

(N.C. App. 1993) (8 character witnesses). See also State v. Carter, 58 N.E.2d 794, 797 (Ohio App. 1944) (holding trial court erred in refusing to permit three additional character witnesses after five testified); State v. Gangwer, 169 W.Va. 177, 182, 286 S.E.2d 389, 393 (1982) (defendant was permitted by trial court to call eleven character witnesses).

Although many other courts have upheld limiting character witnesses to a small number, under the circumstances of this case, the restriction substantially and unfairly prejudiced the defense.

### CONCLUSION

For the above reasons, Respondent Joe Lavigne respectfully requests the Court to affirm the order and judgment of the circuit court in this case.

Respectfully submitted,

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## **CROSS-ASSIGNMENT OF ERROR**

The Circuit Court Erred In Failing To Decide Two Of Mr. Lavigne's Constitutional Claims And Make Findings Of Fact And Conclusions Of Law As To Each Claim.

## **STATEMENT OF THE CASE**

As indicated in the circuit court's Order, A.R. Vol. 1, 29, the court did not address or decide the following two constitutional claims properly raised by Joe in the habeas proceeding below:

Joe Lavigne Was Denied The Right Of Confrontation, Due Process And the Effective Assistance Of Counsel When The Trial Court Permitted The Testimony Of KLL, An Incompetent Witness, At Trial. (A.R. Vol. 1, 34).

The State Presented False Testimony That Mark Berry Was On Electronically Monitored Home Confinement To Show He Could Not Have Committed The Crime In This Case Which Reasonably Affected The Jury's Decision To Convict Joe Lavigne, And Thereby Denied Him Due Process Of Law. (A.R. Vol. 1, 35).

This Court's case law requires the circuit court to address all constitutional claims raised by a habeas petitioner. Therefore, the lower court erred in failing to decide the above claims and should this Court reverse the circuit court's judgment on all assignments of error raised by the State in this appeal, the Court should remand this case to the circuit court to decide the above issues.

## **SUMMARY OF ARGUMENT**

The circuit court erred in failing to address two issues raised by Mr. Lavigne in the habeas proceedings below. W.Va. Code §53-4A-7(c)(1994) requires the circuit court, when ruling on a habeas petition, to make findings of fact and conclusions of law on each ground raised. Since the circuit court failed to comply with that statutory requirement, this Court should

remand this case to the circuit court to make such findings and conclusions if this Court reverses the circuit court's judgment on every ground on which the court granted relief.

### STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary as the issue presented in this cross-appeal has been authoritatively decided in several previous cases. This issue is further suitable for a Rule 21 memorandum decision as it involves the application of settled law.

### ARGUMENT

#### **The Circuit Court Erred In Failing To Decide Two Of Mr. Lavigne's Constitutional Claims And Make Findings Of Fact And Conclusions Of Law As To Each Claim.**

The standard of review for this issue is the same as that indicated in the State's Brief, at 2-3. The circuit court stated in its Order, "this Court will not directly address each issue raised by counsel and Mr. Lavigne[.]" (A.R. Vol. 1, 29). Specifically, the circuit court failed to address, *inter alia*, the following two issues raised by counsel in the habeas proceeding below:

Joe Lavigne Was Denied The Right Of Confrontation, Due Process And the Effective Assistance Of Counsel When The Trial Court Permitted The Testimony Of KLL, An Incompetent Witness, At Trial. (A.R. Vol. 1, 34).

The State Presented False Testimony That Mark Berry Was On Electronically Monitored Home Confinement To Show He Could Not Have Committed The Crime In This Case Which Reasonably Affected The Jury's Decision To Convict Joe Lavigne, And Thereby Denied Him Due Process Of Law. (A.R. Vol. 1, 35).

This was error as W.Va. Code § 53-4A-7(c) (1994), provides in pertinent part:

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In any order entered in accordance with the provision of this section, the court shall make specific findings of fact and conclusions of law relating to each contention and grounds (in fact or law) advanced, shall clearly state the grounds upon which the matter was determined, and shall state whether a federal and/or state right was presented and decided.

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In State ex rel. Watson v. Hill, 200 W.Va. 201, 488 S.E. 2d 476 (1977), this Court reversed the circuit court's denial of the habeas petition because the court failed to address each claim raised by the petitioner, stating:

West Virginia Code section 53-4A-7(c) (1994) requires a circuit court denying or granting relief in a habeas corpus proceeding to make specific findings of fact and conclusions of law relating to each contention advanced by the petitioner, and to state the grounds upon which the matter was determined.

Id. at Syl. Pt. 1. Accord Syl., Banks v. Trent, 206 W.Va. 255, 523 S.E.2d 846 (1999); Syl., Dennis v. State, Division of Corrections, 223 W.Va. 590, 678 S.E.2d 470 (2009). In each of these cases, this Court remanded the case to the circuit court, requiring that findings of fact and conclusions of law be provided by the court.

If the judgment of the circuit court in this case is reversed on all of the grounds on which the court granted relief, this Court should remand this case to the circuit court for findings of fact and conclusions of law on the above claims the court failed to address.

### CONCLUSION

For the above reasons, Respondent Joe Lavigne respectfully requests this Court to remand this case to the circuit court for findings of fact and conclusions of law on the issues the circuit court failed to address, but only if this Court reverses the judgment of the circuit court on every assignment of error raised by the petitioner.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Gregory L. Ayers, hereby certify that on this 14 day of December, 2011, a copy of the foregoing Respondent's Brief And Cross-Assignment Of Error was sent via U.S. Mail to counsel for respondent, Mark A. Sorsaia, Prosecuting Attorney of Putnam County, West Virginia, Putnam County Judicial Building, 3389 Winfield Road, Winfield, WV 25213.



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