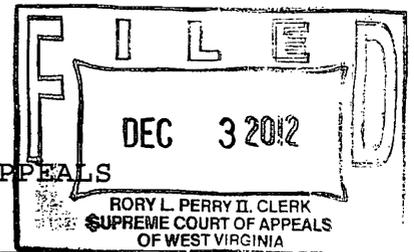


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



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NO. 12-1066

(MARION COUNTY FELONY ACTION NO. 11-F-36)

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State of West Virginia,  
Plaintiff Below, Respondent

v.

Jason Paul Lambert,  
Defendant Below, Petitioner

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PETITIONER'S BRIEF

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I.

ASSIGNMENTS OF ERROR

A) The Trial Court erred by allowing two (2) of the State's witnesses to relate improper testimonial hearsay statements of the alleged child victim who was found incompetent to testify, in violation of the Petitioner's right to confrontation as required by the Sixth Amendment of the United States Constitution and Section 14, Article III of the West Virginia Constitution.

B) Improper and misleading statements by the prosecuting attorney at the conclusion of closing argument bolstering the credibility of the four (4) year old alleged victim who was deemed incompetent to testify constitute plain error.

II.

STATEMENT OF THE CASE

This is an appeal of criminal proceedings and the jury trial before the Circuit Court of Marion County, West Virginia, Division II, Judge David R. Janes presiding, on November 16 and 17, 2011, involving a two (2) count Indictment (Appendix Pages 1 & 2) charging the Petitioner, Jason Paul Lambert, with the felony offenses of "Distribution And Display To Minor Of Obscene Matter", under West Virginia Code §61-8A-2(a), and "Sexual Abuse By Parent, Guardian Or Custodian", under West Virginia Code §61-8D-5.

On November 17, 2011, the Petitioner was found

guilty of both counts, and sentenced on May 11, 2012 to confinement in the penitentiary for not more than Five (5) years on the offense of "Distribution And Display To Minor Of Obscene Matter" and to confinement in the penitentiary for not less than Ten (10) years nor more than Twenty (20) years on the offense of "Sexual Abuse By Parent, Guardian Or Custodian", with said sentences to be run concurrently, and with credit for time served in the regional jail from the 17th day of November, 2012 to the 10th day of May, 2012, in the amount of One Hundred Seventy-six (176) days credit (Appendix Pages 449 - 452).

The allegations stem from the investigation of Corporal Adam Scott of the West Virginia State Police, which contended that on December 4, 2010, Petitioner, Jason Paul Lambert, exposed himself and showed pornography to "S.W.", a four (4) year old child for whom he was babysitting. On December 4, 2010, the Petitioner was watching (11) year old (E.M), her eight (8) year old friend (S.W.) and her four (4) year old sister (S.W.), so that his sister, , and . the mother of S.W. and S.W., could attend an overnight football party.

The four (4) year old alleged victim did not mention anything about the incident until thirteen (13) days later. After the matter was reported to the police on November 17, 2010, Corporal Scott conducted interviews with all three (3) girls, obtained a search warrant for the Lambert residence, and on December 20, 2010, proceeded to the Lambert residence with WVDHHR

Child Protective Services Worker, Stacey Miller, to execute the search warrant and interrogate the Petitioner, who was alone in the residence.

Prior to trial, because of numerous questionable responses of "S.W." appearing in Corporal Scott's video recorded interview of the alleged victim, counsel for the Petitioner moved the Trial Court for an independent evaluation of the competency of the four (4) year old victim (Appendix Pages 3 - 5). By Order of the Trial Court entered on March 31, 2011 (Appendix Pages 6 - 8) the motion was granted and an independent competency evaluation conducted by William Fremouw, Ph.D., A.B.P.P. (Forensic) Licensed Psychologist #151 Diplomate, Forensic Psychology. Dr. Fremouw's psychological evaluation (Appendix 9 - 13) revealed that "S.W.", the four (4) year old alleged victim, was not competent to testify because: 1) she had marginal ability to distinguish between telling the truth and telling a lie; 2) She did not recognize her duty to tell the truth; and, 3) she did not have the capacity to observe, remember and relate events accurately. The State did not obtain any contradictory evaluation regarding the competency of the four (4) year old alleged victim.

On November 10, 2011, an "in camera" hearing was held before the Trial Court on the defendant's "Motion To Conduct In Camera Hearing To Determine Competency of Alleged Victim, A Minor Child of Tender Years, and To Preclude Said Testimony". As a result of the hearing, the Trial Court entered an Order on November

17, 2011, finding that "S.W." was not competent to testify, and precluded "said minor child's testimony and all testimony regarding the statements of said minor child in this matter" (Appendix Pages 62 - 65).

During the jury trial of November 16 and 17, 2011, the principal witness for the prosecution, Corporal Adam Scott of the West Virginia State Police, and Stacey Miller, a child protective services worker for the West Virginia Department of Health and Human Services, testified to statements made by the alleged victim, and the jury heard an unredacted audio version of the Petitioner's statement, taken on December 20, 2010, which contained numerous references to specific testimonial hearsay statements made by "S.W.", the alleged four (4) year old victim who was deemed incompetent to testify. Objections and Motions for Mistrial were made during the trial, but were all overruled by the Trial Court.

At the conclusion of the prosecutor's rebuttal argument during closing, the prosecuting attorney made improper and misleading statements which commented on, and bolstered, the credibility of "S.W.". (Appendix Page 365).

This Appeal involves the following issues: 1) whether counsel for the Petitioner was required under the circumstances to seek an independent competency evaluation of the four year old alleged victim; 2) whether the Court erred by denying Petitioner's motions for a mistrial during trial and allowing the jury to hear two (2) of the State's witnesses offer improper testimonial hearsay

statements of "S.W." in violation of the Petitioner's right to confront the out-of-court statements as required by the Confrontation Clause in the Sixth Amendment of the United States Constitution and Section 14, Article III of the West Virginia Constitution, and, 3) whether the prosecuting attorney's improper and misleading statements at the conclusion of her closing argument which commented on, and bolstered, the credibility of the four (4) year old alleged victim who had previously been determined incompetent to testify by the Court constitute plain error.

### III.

#### SUMMARY OF ARGUMENT

A) Counsel for the Petitioner, Jason Paul Lambert, was required under the circumstances to seek an independent competency evaluation of the four (4) year old alleged victim. However, despite the Court's finding that the alleged child victim was incompetent to testify, the Court erred by allowing the jury to hear two (2) of the State's witnesses offer improper testimonial hearsay statements of the alleged child victim who was deemed incompetent to testify, in violation of the Petitioner's right to confront the out-of-court statements as required by the Sixth Amendment of the United States Constitution and Section 14, Article III of the West Virginia Constitution. Petitioner was deprived of a fair trial because he could not challenge any of the inconsistencies and inaccuracies contained in the statements heard

by the jury.

At the conclusion of the prosecutor's rebuttal argument during closing, the prosecuting attorney made improper and misleading statements which commented on, and bolstered, the credibility of the four (4) year old alleged victim who had previously been determined incompetent to testify by the Court. (Appendix Page 365). Despite counsel's failure to object to these statements before the rebuttal was concluded, these statements were highly prejudicial, resulted in a miscarriage of justice and constitute plain error.

IV.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Counsel for Petitioner desires the opportunity to present oral argument before the Court.

V.

ARGUMENT

THE TRIAL COURT ERRED BY PERMITTING THE STATE'S GOVERNMENT WITNESSES TO TESTIFY TO, OR PRESENT EVIDENCE CONTAINING, TESTIMONIAL HEARSAY STATEMENTS OF AN ALLEGED CHILD VICTIM FOUND INCOMPETENT TO TESTIFY IN VIOLATION OF THE PETITIONER/APPELLANT'S SIXTH AMENDMENT RIGHT OF CONFRONTATION

In order to properly consider the effect of the Trial Court's rulings on the outcome of this proceeding, one must examine

the reasons Petitioner's counsel moved the Court to appoint a neutral child psychiatrist to conduct a transcribed or otherwise recorded competency examination of S.W., the four (4) year old alleged victim in this action.

The videotaped interview taken by Corporal Adam Scott of the four (4) year old alleged victim on December 17, 2010, and as set forth in counsel for Petitioner's Motion (Appendix Pages 3 - 5), showed several responses which called into question the competency of the child. These specifically related to "S.W.'s": ability to know the difference between telling the truth or a lie; and, her ability to remember and relate information correctly, and are summarized as follows:

1) The alleged victim, S.W., had only recently turned four (4) years of age, as her date of birth was 10/15/2006.

2) During the interview:

a) at 00:35 Corporal Scott asked S.W. if she knew what his name was, she shook her head yes, but then indicated she did not know his name;

b) at 01:10 she did not know the date of her birth;

c) at 00:51 when asked how old she was she held up four (4) fingers and then one (1) finger;

d) at 06:05 she did not know how old her sister (S.W.) was;

e) at 9:54 when asked if his blue pen was yellow would that be a truth or a lie, she said no. Then asked if his blue pen

was blue was a truth or a lie, she also said no;

f) at 10:09 when asked "do you know what a lie is", she indicated no;

g) at 10:19 when asked "do you know what its called if you say something that's not real, that didn't happen", she shook her head no;

h) at 32:32 when asked to identify perpetrator she said "he's a grown up, no he's a kid";

i) at 35:00 when asked "can you show me where he put the lotion" on himself, and she points to the girl;

j) at 35:14 when asked "can you show me where he put the lotion on himself", she again points to the girl.

The established principle regarding child witness testimony is clear. As set forth by this Court in Syllabus Point 2 of State v. Stacy, 179 W.Va. 686, 371 S.E.2d 614 (1988), "When a child's capacity to testify that she was the victim of a sexual abuse is in question, the Court should appoint a neutral child psychologist or psychiatrist to conduct a transcribed or otherwise recorded interview." Burdette v. Lobban, Syl. Pt. 2, 174 W.Va. 120, 323 S.E.2d 601 (1984).

"The question of competency of a child as a witness is addressed to the sound discretion of the trial judge, and if it appears that a careful and full examination as to the age, intelligence, capacity and moral accountability has been made by the judge and counsel and the trial judge has concluded that he is competent, the appellate court will not reverse the ruling which permits the evidence to be introduced unless it is apparent that it

was flagrantly wrong. State v. Watson, Syl. Pt. 9, 173 W.Va. 553, 318 S.E.2d 603 (1984); and, Syl. Pt.6 State v. Daggett, 167 W.Va. 411, 280 S.E.2d 545 (1981).

However, if the trial court denies such a motion it will not be disturbed on appeal unless shown to have been plainly abused resulting in manifest error because "the decision whether to submit a sexual assault victim to a competency examination lies wholly in the court's discretion" State v. Pettrey, 209 W.Va. 449, 549 S.E.2d 323, at page 334, citing State v. Murray, 180 W.Va. 41, 375 S.E.2d 405, 412 (1988).

The test of the competency of a young child witness always includes the ability of the child to understand the difference between the truth and a lie and an understanding of the obligation to speak the truth on the witness stand, and based on those inaccurate or inappropriate responses, counsel for the Petitioner was compelled to move the Court to order the appointment of a neutral child psychiatrist to conduct a transcribed or otherwise recorded competency examination of S.W., the alleged victim in this action, for the purpose of addressing the competency of this four (4) year old child. Moreover, based upon this Court's prior rulings as set forth above, counsel for Petitioner's motion to the Court for a competency evaluation of the alleged four (4) year old victim was made with the belief that his failure to do so, would essentially be ineffective assistance of counsel.

As pointed out by this Court in Syllabus Point 1 of State v. Stacy, 179 W.Va. 686, 371 S.E.2d 614 (1988):

In reality, with child witnesses the

distinction between competency and credibility is blurred. With the adoption of W.Va. Rules of Evidence 601, which tracks its federal counterpart, the analysis of competency is replaced by a balancing of the probative value of the testimony against any unfair prejudice resulting from it under W.Va. Rules of Evidence 403. While the adoption of the W.Va. Rules of Evidence has changed the terminology of the analysis, the underlying problems of child witness testimony in sexual abuse cases remain substantially unchanged.

The Trial Court erred by denying Petitioner's motions for a mistrial and allowing the jury to hear two (2) of the State's primary witnesses to relate improper testimonial hearsay statements of the alleged child victim previously found incompetent to testify, in violation of the Petitioner/Appellant's right to confront the out-of-court statements as required by the Sixth Amendment of the Confrontation Clause. Further, the Trial Court erred by denying Petitioner's motions, pursuant to Rules 29(c) and 33 of the West Virginia Rules of Criminal Procedure, to set aside the jury verdict and acquit the defendant in the interests of justice, or alternatively, to grant defendant a new trial.

As set forth in Syllabus Point 1 of State v. Jessica Jane M., 226 W.Va. 242, 700 S.E.2d 302 (2010) (per curiam):

Pursuant to Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) the Confrontation Clause contained within the Sixth Amendment to the United States Constitution and Section 14 of the West Virginia Constitution bars the admission of a testimonial statement by a witness who does not appear at trial, unless the witness is unavailable **and the accused had a prior opportunity to cross-examine the witness.** Syllabus Point 6, State v. Mechling, 219 W.Va. 366, 633 S.E.2d 311 (2006). **(Bold Added)**

By Order of the Trial Court entered on the 17th day of November, 2011 (Appendix Pages 62 - 65), from evidence adduced at hearing on November 10, 2011, the Court found "S.W." the alleged victim, "not competent to testify" and precluded "said minor's testimony and all testimony regarding the statements of said minor in this matter". The Court's ruling was based upon the opinion and psychological evaluation of William Fremouw, Ph.D., A.B.P.P. (Forensic) Licensed Psychologist #151 Diplomate, Forensic Psychology (Appendix Pages 9 - 12), which found the child to be deficient in all three (3) areas involved in a determination of competency: the ability to distinguish between telling the truth and telling a lie; the ability recognize the duty to tell the truth; and, the capacity to observe, remember and relate events accurately.

During the trial, Stacy Miller, Child Protective Services Worker for the West Virginia Department of Health and Human Services testified that while with Corporal Adam Scott at the Petitioner's residence they found "Lotions that the child had referenced" (Appendix Page 209). This is a "testimonial" hearsay statement indicating that they had found exactly what the child had told them was used in the alleged assault, and constituted a damaging and harmful reference to a fact that could not otherwise be challenged (i.e. that the bottle color or was incorrect or that it was conditioner, not lotion). As a Child Protective Services worker, Stacey Miller, is a government employee who is relating

information received by her in her capacity as a government employee.

Many more damaging testimonial hearsay statements were adduced by the principal witness for the prosecution, Corporal Adam Scott of the West Virginia State Police. Corporal Scott presented the unredacted audio version of the statement taken by him of the Petitioner on December 20, 2010 which contained several specific statements of the minor child's allegations. These testimonial hearsay statements are set forth below:

a) And while "E.M" and I think "S.W." were outside you took "S.W." up to your bedroom and you take your clothes off, you show her pornography, and then you get some lotion out and you masturbate, or you know, when you rubbed it all over your penis. And I --- she saw that, she's already told me about it all. And coming from a four-year old girl she was very descriptive about it. And later bolstered her out-of-court statement again with: Listen, and it was very descriptive for a four-year old. (Bold Added)

(Appendix Page 390)

b) She's come up with too much information, you know, that's specific for a four-year old --- sexual specific, for her to be lying, okay, in our interview. (Bold Added) (Appendix Page 391)

c) When they see all of the evidence I've got from her, and she can tell it. As a matter of fact she's very articulate for a four-year old. (Appendix Pages 392 and 393)

d) When they hear this little girl's story, and see the

evidence I've got, and the description she gave me..., well, nobody's going to believe you". (Appendix page 394)

e) A little four-year old doesn't come up and tell you about what's doing here and what's going on there, and how it looked, and taking dolls and showing you exactly how it happened. That's the penis, and the... vagina, and the mouth and stuff. But she showed me exactly how it happened on the video. (Bold Added) (Appendix Pages 395 and 396)

f) Has she saw your penis because she talked about what it looked like. She picked one out for me on a diagram. (Bold Added) (appendix Page 397)

g) And all I've got to do is show it, and she's going to describe a scene, which she's already done, which is pretty good for a four-year old. (Bold Added) Appendix Page 398)

h) She even told me where you --- put the clothes when you took them off. I mean she's that detailed. But then unlucky for you --- most four-year olds don't know that and don't --- they're not that articulate and not that up to date and not that, you know, open-eyed with what's going on with what happened. She is, and she saw a lot of stuff, and she explained to me in detail for someone (inaudible) to watch it. (Bold Added) (Appendix Page 399)

i) I think you did tell "S.W." to touch it because she told me --- She said, "He asked me to touch it and I said no, definitely no." And a four-year old saying "definitely no". "No, definitely no". (Bold Added) (Appendix Page 400)

j) Because she told me --- Yeah. She told me that, you know, she told me that he wanted me to promise I wouldn't tell anybody. (Bold Added) (Appendix Page 401)

The Trial Court's ruling was that these were not "testimonial" statements under Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

In Crawford, supra, the Supreme Court declined to provide a "comprehensive" definition of what constituted "testimonial" evidence. However, in the later case of Davis v. Washington, 547 U.S. 813, 126 S.Ct. 226, 165 L.Ed.2d 224 (2006), the Court explained what constitutes testimonial hearsay as follows:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances indicate that there is no ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later prosecution.

In the case at bar, there is no question that the statement of "S.W." was obtained for no other purpose than to establish past events relevant to a prosecution of the defendant, and should thus be deemed "testimonial". Certainly, considering the more than thirteen (13) days had transpired between the alleged criminal acts and when it was reported and investigated negate any contention that the statement was taken in order to meet any ongoing emergency.

The defendant's Sixth Amendment privilege of confrontation requires that Petitioner be given the opportunity to confront and cross-examine his accuser, as set forth above in this Court's interpretation of Crawford, supra, in State v. Mechling, 219 W.Va. 366, 633 S.E.2d 311 (2006). See also, State v. Frazier, No. 11-0691 (W.Va. 2012). "The only exception is where the witness was unavailable to testify, and the defendant had a prior opportunity to cross-examine that witness". Mechling, supra, at 318.

In State v. Hopkins, 137 Wn. App.441, 154 P.3d 250 (2007), a subsequent decision of the Supreme Court of Appeals of Washington, the Court distinguished two (2) points relevant to the issue before this Court. In that case, a jury convicted the defendant of raping and molesting his girlfriend's two-and-one-half-year old daughter. Because the alleged victim was only three-and-one-half-years of age at the time of trial, the State and defense counsel agreed that the alleged victim was incompetent to testify, instead of requiring the Court to conduct a competency hearing before finding the child unavailable as a witness. In finding that the required competency hearing was a prerequisite for finding a child witness unavailable for trial, the Court held that absent strict compliance with the required competency hearing or some other exception to the Rules of Evidence excluding hearsay, that "a child hearsay statement is simply inadmissible as a matter of law when the child does not testify at trial" Hopkins, supra, at

page 254.

Secondly, in further interpretation of Crawford, supra, the Court distinguished statements made to "family members" from statements made to a Child Protective Service Worker and law enforcement personnel as "government employees". The Court discussed it's reasoning from the case of State v. Shafer, 156 Wash.2d 381, 128 P.3d 87 (2006). In Shafer, supra, the Court denied the defendant's motion to exclude the child's out-of-court statements made to a family friend based upon the United States Supreme Court's Crawford decision, and stated:

Our Court (1) relied on Crawford's notion that an "accuser who makes a formal statement to government officers bears testimonial in a sense that a person who bears a casual remark to an acquaintance does not," 541 U.S. at 51, 124 S.Ct. 1354; and (2) reasoned that a victim's statements to friends and family are generally nontestimonial statements because there is "no contemplation of bearing formal witness against the accused" Shafer, 156 Wash.2d at 389, 128 P.3d 87 (2006).

The Court continues:

We find instructive here the Washington Supreme Court's dicta in Shafer that the common thread uniting testimonial statements is "some degree of involvement by a government official, whether that person was acting as a police officer, as a justice of the peace, or as an instrument of the court" Shafer, 156 Wash.2d at 389, 128 P.3d 87 (2006).

Based on that reasoning the Court held that the child victim's hearsay disclosures made to the Child Protective Service Worker in her role as a "government employee" were "testimonial",

and found "their admission at trial violated Hopkins' Sixth Amendment protections because (the child victim) did not testify at trial.

Other jurisdictions have held that children's statements to social workers are "testimonial" when received in their capacity as government employees. In State v. Blue, 2006 N.D. 134, 717 N.W.2d 558, 564-67 (2006), statements made to a forensic interviewer were deemed testimonial when received through a videotaped interview while a police officer watched from a different room, because the interviewer was acting in concert with or as an agent of the Government. In State v. Mack, 337 Or. 586, 101 P.3d 349, 352-53 (2004), statements made to a caseworker who interviewed a child so that police officers could videotape the child's statement for use in a criminal proceeding were deemed testimonial because the caseworker was serving as a proxy for the police. In Snowden v. State, 156 Md.App. 139, 846 A.2d 36, 47 (Md. 2004), the Court held that Crawford prohibited a state social worker from testifying to a child's statement because she was assigned to investigate allegations of abuse.

This is on point with the issues before this Court in the case at bar. Both Stacey Miller, the Child Protective Service Worker, and Corporal Adam Scott, of the West Virginia State Police, received the information from the child in the course of a prosecutorial investigation. By allowing these two (2) witnesses to testify to "testimonial" hearsay statements to the jury, where

the factual basis for those statements is unable to be challenged, where there is no opportunity to confront his accuser or examine the truth or inconsistencies of the assertions, the Petitioner/Appellant was denied a fair trial.

In Crawford, supra, the United States Supreme Court held that out-of-court testimonial hearsay statements by declarants are barred, under the confrontation clause of the Sixth Amendment to Constitution of the United States, from admission against the defendant at his/her trial unless: (1) the declarant appears as a witness in the trial; or (2) the declarant is unavailable and the defendant has had an opportunity to cross-examine the declarant regarding the out-of-court statement, irrespective of whether such out-of-court statement is deemed reliable by the trial court. Even if the out-of-court statements in this case are an exception to Crawford under the theory that they were not offered for the truth of the matter asserted, but for another legitimate purpose, the defendant was denied his right to confront the reliability, truth and veracity of the statements by an independent cross-examination of the child prior to trial regarding inconsistencies and errors in her original statement, which could be utilized in his defense.

The statements made to Corporal Scott by the four (4) year old alleged victim in this matter during his interview contain several inconsistencies and called into question the child's competency and specifically her ability to know the difference between telling the truth or a lie, her obligation to

tell the truth, and her ability to remember and relate information correctly. The Court thereafter determined that S.W. was not competent to testify. Some of these specific statements were related to the jury during Trooper Scott's testimony when the statement of the Petitioner taken on December 20, 2010 was played to the jury. By the Court's permitting these specific statements to be heard by the jury, including remarks which bolstered S.W.'s credibility to those "testimonial" hearsay statements, the jury would not question the truth of the matters asserted. Accordingly, the Petitioner was denied a fair trial by never getting to challenge the inconsistencies of the "testimonial" hearsay statements through his Sixth Amendment right of confrontation. In essence, while the Petitioner won the battle with the Court's ruling that the child was incompetent to testify, he ultimately lost the war because he was unable to contest any of the inconsistencies of her statement, and the jury had no opportunity to weigh and consider the validity of those statements in the light of matters which bear upon the credibility of that evidence.

PROSECUTOR STATEMENTS DURING REBUTTAL ARGUMENT BOLSTERING  
CREDIBILITY OF CHILD WITNESS DEEMED INCOMPETENT TO TESTIFY

CONSTITUTE PLAIN ERROR

At the end of the prosecutor's rebuttal argument the prosecuting attorney improperly commented on the credibility of the

four (4) year old alleged victim, who had previously been determined incompetent to testify by the Court, as follows:

"The child's not being credible is not the same as the child not being competent. I wish, oh how I wish you could have heard her talk or met her or seen her. But she's four. And you have to reach a certain developmental level to be a witness in a trial" (Appendix Page 365), and continued, "But when you're four, you're just not old enough to be able to be a witness in court. That doesn't mean she wasn't telling the truth, that she's a liar or anything like that. She didn't have any reason to make up these allegations against Jason Lambert. She had nothing to gain." (Appendix Page 365).

Regrettably, counsel for Petitioner failed to pose any objection before the statements were made and the rebuttal argument was concluded. Regardless, the prosecutor's comments improperly bolster the credibility of the four (4) year old alleged victim who did not testify in the trial because she was found to be incompetent, but whose "testimonial" hearsay statements were presented through the testimony of the two (2) governmental witnesses in the trial.

"It is a well-settled policy that the Supreme Court of Appeals normally will not rule upon unassigned or imperfectly assigned errors, this Court will take cognizance of plain error involving a fundamental right of an accused which is protected by the Constitution". Syl. Pt. 4, State v. Starr, 158 W.Va. 905, 216

S.E.2d 242 (1975).

However, Rule 52(b) of the West Virginia Rules of Criminal Procedure states that "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

"The plain error doctrine is to be used sparingly and only in those circumstances in which a miscarriage of justice would otherwise result." Syl. Pt. 2, State v. Hatala, 176 W.Va. 435, 345 S.E.2d 310 (1986); State v. Fisher, 179 W.Va. 516, 370 S.E.2d 480 (1988); State v. Harris, 189 W.Va. 423, 432 S.E.2d 93 (1993); and, State v. Mayo, 191 W.Va. 79, 443 S.E.2d 236 (1994).

Did counsel for Petitioner err in not objecting to the prosecutor improperly vouch the credibility of a the four (4) year old alleged victim who was found incompetent to testify? While it is clear that these remarks were made at the end of the prosecutor's rebuttal argument, and were completed immediately before the rebuttal was concluded, it is equally clear that these remarks were an improper appeal to the jury regarding the credibility of the four (4) year old's statements.

These comments are much more egregious than the comments of the prosecuting attorney interjecting an opinion of the truthfulness of the defendant as examined by this Court in State v. Nicholas, 182 W.Va. 199, 387 S.E.2d 104 (1989), as the comments in the case at bar, represent a direct plea to the jury: 1) that the four (4) year old alleged victim's claims were credible even though

she was found incompetent to testify; 2) that her age of four (4) alone was the factor that precluded her from testifying in court; and 3) that her allegations were truthful. These statements are not only improper, they are misleading, and likely affected the truth-finding process of the jury.

VI.

CONCLUSION

Wherefore, the Petitioner/Appellant respectfully moves this Honorable Court to reverse his conviction in the interests of justice.

RESPECTFULLY SUBMITTED:

Jason Paul Lambert,  
Petitioner  
By Counsel



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Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Neal Jay Hamilton, do hereby certify that on the 30<sup>TH</sup> day of November, 2012, I served the foregoing PETITIONER'S BRIEF upon the opposing party by sending a true and accurate copy thereof to their counsel of record, Laura Young, at her office address of:

Laura Young  
Assistant Attorney General  
Office of the Attorney General  
812 Quarrier Street, 6th Floor  
Charleston, WV 25301

by United States mail, first class, postage prepaid.