

**FILED**

**June 22, 2011**

**RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA**

WORKMAN, Chief Justice, concurring:

I concur in the result reached in this opinion. I write separately merely to emphasize a point articulated by the majority in footnote 32 of the opinion. Specifically, in holding that a trial court must determine the admissibility of each individual declaration or remark, the majority states in that footnote: “[A] trial court must determine if the offered declaration or remark made by the unavailable declarant is hearsay and, if it is, whether it falls within a firmly rooted hearsay exception or has a particularized guarantee of trustworthiness.” I agree.

In a dissent to *State v. Phillips*, 194 W. Va. 569, 461 S.E.2d 75 (1995) (Workman, J., dissenting), I admonished the majority for failing to determine, as a preliminary matter, whether certain out-of-court statements by an unavailable witness were hearsay before determining whether those statements were admissible as an exception to the hearsay rule. As I explained in my dissent, the statements in *Phillips* were not hearsay under West Virginia Rule of Evidence 801(c), as they were not offered into evidence to prove the truth of the matter asserted. *Id.* at 591, 261 S.E.2d at 97. The majority in *Phillips*, however, omitted this important first step in its analysis and instead proceeded directly to analyze

whether the statements fell within any of the hearsay exceptions found in West Virginia Rule of Evidence 803. I found error with this approach and dissented on that ground, among others.

The instant opinion authored by Justice McHugh has succinctly and correctly clarified the proper analytical approach in this context. Thus, I write merely to remind the trial court on remand to engage in this all-important first step of the hearsay analysis. I take no position as to which, if any, of the statements at issue in the instant case fall outside of the hearsay category. I simply wish to emphasize that the relevant exceptions to the hearsay rule only apply when the statements at issue are, in fact, hearsay.