IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

People Of The State Of Illinois	)	
Plaintiff	)	
vs.	)	**No. 09 CF 1048**
Drew Peterson	)	
Defendant	)	

DEFENDANT'S REPLY TO THE RESPONSES OF THE ATTORNEY GENERAL OF THE STATE OF ILLINOIS AND THE WILL COUNTY STATES ATTORNEY TO DEFENDANT'S MOTION TO DECLARE 725 ILCS 5/115-10.6 UNCONSTITUTIONAL

Now comes the Defendant **Drew Peterson**, by and through his attorneys **Joel A. Brodsky and Reem Odeh of the law firm of Brodsky & Odeh** and **Andrew P. Abood of The Abood Law Firm** and in a consolidated Reply to the two separate Responses of the Attorney General of the State Of Illinois, and the Will County State's Attorney, states as follows:

I. Introduction:

On August 14, 2009, this Court granted the Attorney General of the State of Illinois leave to intervene in this case for the sole purpose of responding to the Defendant's Motion To have 725 ILCS 5/115-10.6 Declared Unconstitutional. It was believed at that time (at least by the Defendant's counsel) that either the Attorney General alone, or the Attorney General and the Will County State's Attorney working together, would file a single Response to the Defendant's Motion. However, the Attorney General and the Will County State's Attorney filed one Response brief, and then the Will County State's Attorney alone has filed a second separate Response brief. Both briefs contain basically the same arguments, and cite the same law, just in a different order.

The Defendant will be filing only one Reply brief, and will address each and every argument addressed in both Responses. Defendant believes that this is the best way to present the issues to the Court in a clear and meaningful manner.

II. Supreme Court Rule 18 And The Principle Of Alternate, Non-Constitutional Grounds For Ruling Where A Constitutional Challenge Is Raised Do Not Apply:

The State raises the issue of Supreme Court Rule 18 and **In Re E.H., 224 Ill.2d 172 (2006)** for the proposition that this Court must try to resolve the issue of whether or not the new hearsay exception contained in **725 ILCS 5/115-10.6** is applicable in this case on non-constitutional grounds first, before reaching any decision on whether the law[1] is unconstitutional. The Court in **In Re E.H.** discussed Supreme Court Rule 18 and provided an "analytical flow chart" for how courts should reach constitutional issues regarding the admission of hearsay exceptions. At first blush, it would seem that **In Re E.H.** would require the circuit court to first hold a full evidentiary hearing on a hearsay exception and hold that the proffered evidence was admissible under the exception, before it could consider a constitutional challenge to the statute. However, in two subsequent cases the Illinois Supreme Court has backed away from a rigid application of the analytical flowchart dealing with non-constitutional issues first. In **People v. Stechly, 225 Ill. 2d 246 (Ill. 2007)**, the Illinois Supreme Court held that when dealing with Confrontation Clause challenges and **Crawford v. Washington, 541 U.S. 36 (2004)**, (as we are in the instant case), the court should deal with the issue of constitutionality first, rather than try to resolve the case on non-constitutional grounds:

As a general rule courts avoid deciding constitutional questions when other,

[1] Although the State objects to the Defense reference to 725 ILCS 5/115-10.6 as "Drew's Law", it was the Will County State's Attorney who in his press release of October 22, 2008 linked this law to the Kath Savio and Stacy Peterson investigations. It is the State's Attorney that started this trend which now has 32,400 internet hits on Google for the search "Drew Peterson law." The Defense that is not to blame for the public perception that 725 ILCS 5/115-10.6 was enacted to "get" Drew Peterson.

> nonconstitutional grounds exist for resolving the case. See, *e.g.*, *People v. Lee, 214 Ill. 2d 476, 482, 828 N.E.2d 237, 293 Ill. Dec. 267 (2005)*; *In re Detention of Swope, 213 Ill. 2d 210, 218, 821 N.E.2d 283, 290 Ill. Dec. 232 (2004)*, quoting *In re S.G., 175 Ill. 2d 471, 479, 677 N.E.2d 920, 222 Ill. Dec. 386 (1997)*. Thus we ordinarily first would turn to defendant's arguments regarding reliability and availability, before addressing *Crawford* and the *confrontation clause*. However, as the State notes, defendant's reliability and availability arguments are both couched in constitutional terms. **Moreover, the far-reaching changes *Crawford* and its progeny have wrought to confrontation clause analysis may well impact our consideration of these other issues as well. Accordingly, we believe the most efficient route will be to turn first to defendant's new argument: that introduction of M.M.'s statements to her mother, Grote, and Yates violated his rights under the *confrontation clause*. People v. Stechly, 225 Ill. 2d 246 (Ill. 2007)** (emphasis added)

Then, one year later, in 2008, the Supreme Court recognized that the "analytical flow chart" of **In Re E.H.** required a waste of judicial effort and resources in the face of a strong constitutional challenge to a particular statute, and required the circuit court and the lawyers to hold a long and arduous mini-trial on evidentiary issues before addressing an obvious constitutional infirmity. In clarifying and modifying the holding of **In Re E.H.**, the Supreme Court ruled in **People v. Carpenter, 228 Ill. 2d 250, 260 (Ill. 2008)**:

> The State's interpretation of cases such as Mulay v. Mulay, 225 Ill. 2d 601, 870 N.E.2d 328, 312 Ill. Dec. 263 (2007), People v. Hampton, 225 Ill. 2d 238, 243-44, 867 N.E.2d 957, 310 Ill. Dec. 906 (2007), In re E.H., 224 Ill. 2d 172, 863 N.E.2d 231, 309 Ill. Dec. 1 (2006), and People v. Lee, 214 Ill. 2d 476, 828 N.E.2d 237, 293 Ill. Dec. 267 (2005), would essentially require that circuit courts violate the rights of those charged with criminal offenses and engage in wasteful procedural and analytical practices. ***The absurdity of requiring defendants Garibaldi and Montes-Medina to litigate a motion to suppress, and obtain a ruling thereon, as a prerequisite to obtaining dismissal of charges based upon the holding in Carpenter should be apparent.*** There was an appellate court precedent, directly on point, holding section 12-612 unconstitutional. Yet, the State would require the defendants to not only litigate the motions to suppress--as the motions might have been granted--but also, presumably, undergo the rigors of a criminal trial--as they might have been acquitted. Under either of these scenarios, the circuit court could have avoided ruling upon the constitutionality of the statute, but at the expense of defendants' constitutional rights. We cannot emphasize enough: these are individuals charged with felonies. The criminal statutes of this state are not so sacrosanct, nor is our pursuit of judicial economy so preeminent, that we will endorse the trampling of citizens' rights in pursuit of either. ***A citizen should not have to endure or defend a***

> ***felony prosecution premised upon an unconstitutional statute. Our precedents do not hold otherwise.*** "**People v. Carpenter, 228 Ill. 2d 250, 260 (Ill. 2008)**

The Court then went on to note the "analytical flow chart" of **In Re E.H.**, only applied to how **appellate courts** should address and analyze constitutional challenges, and was not meant to be a requirement on how the circuit courts should proceed:

> Hampton, E.H., and Lee addressed the sequence of ***appellate analysis***, so those decisions are ***not even pertinent to the appropriate circuit court action*** in the cases of defendants Garibaldi and Montes-Medina. While Mulay did address the proper procedure in the circuit court, requiring the circuit court to first rule upon the "legal insufficiency" of a petition before deciding a constitutional issue, we find two bases for distinguishing Mulay. First, in Mulay, there was no clear precedent holding a statute unconstitutional, as was the case here. Thus, there was no controlling authority that the circuit court was compelled to follow. Second, we believe a different rule must obtain where, as here, defendants are the subjects of criminal prosecutions, with all the serious consequences that entails, and the statute in question sets forth the offense upon which the prosecution is founded." **People v. Carpenter, 228 Ill. 2d 250, 260 (Ill. 2008)**

Also, **Carpenter**, Id., noted that while Supreme Court Rule 18 does require that when a court finds a law unconstitutional, and it find that the "decision or judgment cannot rest upon an alternative ground," the rule in no way requires that the circuit court hold an evidentiary hearing before it reaches this decision.

Imagine the waste of valuable time and effort, and the prejudicial effect on any potential jury pool, if we have, as the State seems to suggest we should, a two week long mini-trial on the admissibility of the proffered hearsay statements first, and only then deal with the constitutional issues. What a waste of effort and time and risk of prejudice to the Defendant's right to a fair trial if we find out then, after the mini trial, that **725 ILCS 5/115-10.6** is indeed unconstitutional.[2] As the

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[2] As the Court will recall, during in chambers discussions on this very issue. it was agreed that the best way to proceed in order to preserve resources and minimize any adverse effect on a jury pool, was to address the constitutional issues first. The fact that the Attorney General joined the case for a limited purpose does not change the consensus that the parties and the Court reached.

Illinois Supreme Court states in **People v. Stechly**, Id. and **People v. Carpenter**, Id., under these circumstances, there is no need to go through this exercise. This Court can take up the issue of the constitutionality of **725 ILCS 5/115-10.6** at this point in the proceedings.

III. The Issue Of The Retroactive Application of 725 ILCS 5/115-10.6 In This Case Can Be Readily Resolved In Defendant's Favor On Non-Constitutional Statutory Grounds:

As shown above, there is no absolute requirement that this Court try to resolve the Defendant's objection to the use of **725 ILCS 5/115-10.6** on non-constitutional grounds first. However, in any event, this Motion can be resolved on purely statutory grounds. A reference to **5 ILCS 70/4** (Section 4 of the "Statute On Statutes") shows that Illinois statutory law also prohibits the application of the new hearsay law to this case. Therefore, if this Court chooses, it can grant the Defendant's Motion and bar the State from using the new hearsay law by applying an Illinois statute.

5 ILCS 70/4 states:

> Sec. 4. ***No new law shall be construed to repeal*** a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, ***or any right accrued***, or claim arising under the former law, ***or in any way whatever to affect*** any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, ***or any right accrued***, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding. If any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect. This section shall extend to all repeals, either by express words or by implication, whether the repeal is in the act making any new provision upon the same subject or in any other act. **5 ILCS 70/4**.

This law was adopted in 1874, so its language is a bit arcane, but as far as the retroactive application of new laws is concerned, the Illinois Supreme Court has recently reaffirmed that:

> This court has interpreted section 4 to mean that procedural changes to statutes may be applied retroactively, ***while substantive changes may not***. **People v. Atkins, 217 Ill. 2d 66, 71 (Ill. 2005)** (emphasis added)

Quite simply, then, if the hearsay exception of **725 ILCS 5/115-10.6** is a substantive change in the law, then it cannot be applied retroactively in this case, and this Court can so rule and resolve this issue. This issue, then, is, is **725 ILCS 5/115-10.6** a substantive or procedural change in the law? If it is substantive, then by statute it cannot retroactively.

In interpreting 5 ILCS 70/4, the Appellate Court has stated:

> [T]he retroactive application of criminal statutes is ***specifically prohibited*** by the ex post facto provisions of the United States and Illinois constitutions (U.S. Const., art. I, sec. 9; Ill. Const. 1970, art. I, sec. 16) ***and rules of statutory construction*** (Ill. Rev. Stat. 1977, ch. 131, par. 4)[3] A statute is characterized as retroactive if it takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions already past. **People v. Dalby, 115 Ill. App. 3d 35, 38 (Ill. App. Ct. 3d Dist. 1983)** (emphasis and footnote added).

Therefore, if **725 ILCS 5/115-10.6** removes or impairs a vested right of the Defendant, or attaches a new disability to Defendant, it is a substantive law and cannot be applied retroactively.

What **725 ILCS 5/115-10.6** clearly does (setting aside all constitutional challenges for the moment), is take away Defendant's vested right to confront and cross-examine witnesses against him by allowing hearsay evidence into evidence at trial. As Will County State's Attorney Glasgow said in a press release dated October 22, 2008 referring to the passage of the hearsay law by the Illinois Legislature, "This common-sense legislation, which will become law in November, will enable prosecutors to bring ***previously inadmissible evidence to trial*** to ensure abusive murderers cannot profit from their wrongdoing." (emphasis added) Therefore, the State's Attorney himself admits that **725 ILCS 5/115-10.6** removes rights from Defendant and disables Defendant from asserting the rights he previously had to object to evidence because he cannot cross-examine the ***declarant***.

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[3] Ill. Rev. Stat. 1977, ch. 131, par. 4 is now 5 ILCS 70/4.

What is more fundamental and substantive than the right to cross-examine the actual witness (the declarant) or object to the admission of hearsay testimony because the actual witness/declarant cannot be cross-examined? In **People v. Baptiste, 37 Ill. App. 3d 808, 811 (1976)**, the court stated:

> In Alford v. United States (1931), 282 U.S. 687, 75 L. Ed. 624, 51 S. Ct. 218, defense counsel was denied permission to inquire into a government witness' status as a prisoner of the Federal authorities. The Supreme Court stated:
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> > Cross-examination of a witness is a matter of right. The Ottawa, 3 Wall. 268, 271. Its permissible purposes, among others, are * * * that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased [Citations.] **People v. Baptiste, 37 Ill. App. 3d 808, 811 (1976)**.

In **Alford v. United States, 282 U.S. 687 (1931)**, the Supreme Court of the United States held that the denial of the right of cross-examination is the denial of a right to a fair trial:

> ***Cross-examination of a witness is a matter of right.*** Its permissible purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood, that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment, and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased. Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. ***It is the essence of a fair trial that reasonable latitude be given the cross-examiner***, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to ***deny a substantial right and withdraw one of the safeguards essential to a fair trial.*** In this respect a summary denial of the right of cross-examination is distinguishable from the erroneous admission of harmless testimony. **Alford v. United States, 282 U.S. 687, 690-692 (U.S. 1931) (internal citations omitted)**

The Supreme Court of the United States has also called the denial of cross-examination a constitutional error of the first magnitude:

> If there was here a denial of cross-examination without waiver, it would be

> constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it. **Brookhart v. Janis, 384 U.S. 1, 3 (U.S. 1966)**

Brookhart, Id, does refer to the denial of cross-examination "without waiver," and obviously, the State is claiming waiver under the new hearsay exception. However, we are not talking about waiver of the right to cross-examine here, we are talking about the retroactive application of the law creating the waiver. If that law affects or impairs a vested right or attaches a new disability, (**People v. Dalby**, Id), then it is a substantive right and cannot be applied retroactively under **5 ILCS 70/4**. And "[c]ross-examination of a witness is a matter of right." **Alford**, Id. (In accord, see **Michigan v. Watkins 277 Mich. App. 358; 745 N.W.2d 149 (2007)**, holding that a change in the rules of evidence is a substantive change because rules of evidence involve policy considerations.)

Finally, as the Illinois Supreme Court has recognized, laws that affect the right of cross-examination are disfavored:

> Recognizing the critical function cross-examination serves in a criminal defense, the Supreme Court has "scrupulously guarded against 'restrictions imposed by law or by the trial court on the scope of cross-examination.' **People v. Foggy, 121 Ill. 2d 337, 356 (Ill. 1988)**

Therefore, the hearsay statute **725 ILCS 5/115-10.6** takes away, impairs, and disables Defendant from asserting his right to object to the "previously inadmissible evidence" at trial on the basis that he cannot cross-examine the declarant. This is a monumental change in the basic due process rights Defendant had previous to the enactment of **725 ILCS 5/115-10.6**, and therefore, is a substantive change in the law. Under **5 ILCS 70/4**, this law cannot be applied retroactively. Thus, this Court does not have to reach the constitutionality issue, and can rule that the new hearsay law of **725 ILCS 5/115-10.6**, based on the statutory grounds of **5 ILCS 70/4**.

IV. 725 ILCS 5/115-10.6 Is An Ex Post Facto Law:

Simply put, to apply the new hearsay law, **725 ILCS 5/115-10.6**, in this case would violate the *ex post facto* provisions of the Federal and State Constitutions. The State's arguments to the contrary do not stand up to scrutiny and should be rejected by this Court.

A. The New Hearsay Law Changes Illinois Law:

The Will County State's Attorney has already admitted that **725 ILCS 5/115-10.6** changes existing Illinois law. In his October 22, 2008 press release, Mr. Glasgow stated publically that **725 ILCS 5/115-10.6**:

> This common-sense legislation, which will become law in November, will enable prosecutors to bring ***previously inadmissible evidence to trial*** to ensure abusive murderers cannot profit from their wrongdoing. (emphasis added)

However, now, the State is arguing that **725 ILCS 5/115-10.6** does not change the previous law in Illinois.[4] Defendant is in the unique position of saying that Mr. Glasgow was right when he said that the new hearsay law allows prosecutors (albeit unconstitutionally) to bring previously inadmissable evidence into trial.

The best evidence, besides the State's Attorney's own statements, that the new hearsay exception is more than a mere codification of forfeiture by wrongdoing is the language of the statute itself. Section (g) of **725 ILCS 5/115-10.6** states:

> (g) This Section in no way precludes or changes the application of the existing common law doctrine of forfeiture by wrongdoing.

This "savings clause" in the statute was put there because the State Legislature knew that this statute created a brand new hearsay exception, based on wrongdoing, but did not want a court to rule that it in some way superceded and repealed the existing common law doctrine of forfeiture by

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[4] Perhaps the State's Attorney will want his spokesman to issue a new press release regarding **725 ILCS 5/115-10.6**, retracting his statement of October 22, 2008 and stating that his new hearsay law really doesn't change a thing.

wrongdoing.

Proof that this Illinois State Legislature knew it was creating a new and different hearsay exception is also contained in the transcripts of the legislative debates on **725 ILCS 5/115-10.6**. For example, on the 293rd Legislative Day (11/19/08), of the 95th General Assembly, on pages 20-21 of the transcript of that date, State Representative Jim Durkin stated in support of this statute:

> What we're saying in this situation, if we do have evidence that these people were silenced in the worst way, ***they were killed by the individual that they were testifying against, then they should...there should be an avenue, at least an opportunity for them to have those statements presented before the court***, as long as there's a certain indicia of reliability to go through all the bullet points of the Constitution and Supreme Court says. But I think this is a good Bill. ***And the fact is, its going to help a lot of these cases, which we've lost over the years. And this is a ... it's been a decades' old problem with has happened within our criminal justice system.*** And I know that Representative Gordon and Reboletti and myself could all say that we probably had a witness who all of a sudden wakes up or don't wake up, and which is unfortunate and off of a sudden justice is not served.

Here, Representative Durkin clearly states that this new hearsay exception is meant to remedy a "decades old" situation where witnesses were killed, and, because of that, cases were "lost over the years." If, as the State would have us believe, **725 ILCS 5/115-10.6** were a mere codification of long existing common law, there would have been no need to fix a problem that caused cases to be lost in the past.

Also, on the 276th Legislative Day of the 95th (5/30/08) General Assembly, on page 257 of the transcript of that date, Representative Reboletti, a co-sponsor of the bill that became **725 ILCS 5/115-10.6**, stated:

> Reboletti: "To the Bill, Mr. Speaker. Ladies and Gentlemen of the House, I think this is a very important landmark piece of legislation. ***We have cases in the State of Illinois that go unprosecuted because the victim of the crime has been killed, but has told someone else beforehand that this was going to happen to them and then absolutely does happen to them, but the prosecutors have no recourse***. I think this will take care of that. And I would urge an 'aye' vote." **(pg 257)**

Here, a co-sponsor of the bill that became **725 ILCS 5/115-10.6** acknowledges that it is a new exception to the hearsay law that grants an exception that was not heretofore available to prosecutors.

To further understand why **725 ILCS 5/115-10.6** is not a mere codification of the common law doctrine of forfeiture by wrongdoing, we only have to look at Justice Scalia's opinion in **Giles v. California, 128 S. Ct. 2678, 2684 (U.S. 2008)**. In that case, Justice Scalia stated that at common law the hearsay statements of a murder victim could never be admitted under the common law doctrine of forfeiture by wrongdoing.

> In cases where the evidence suggested that the defendant had caused a person to be absent, but had not done so to prevent the person from testifying--as in the typical murder case involving accusatorial statements by the victim--the testimony was excluded unless it was confronted or fell within the dying-declaration exception. Prosecutors do not appear to have even argued that the judge could admit the unconfronted statements because the defendant committed the murder for which he was on trial. **Giles v. California, 128 S. Ct. 2678, 2684 (U.S. 2008)**

However, in stark contrast to the common law doctrine of forfeiture by wrongdoing, the new Illinois hearsay statute **725 ILCS 5/115-10.6** is specifically designed to allow the unconfronted hearsay statements of a murder victim to be admitted at trial.

Therefore, it is undeniable that new hearsay exception of **725 ILCS 5/115-10.6** is much different than the common law, it changes the existing common law by creating a brand new exception that would allow murder victims' hearsay statements to be admitted in trial for the victims' murder. As Justice Scalia stated, this was so unheard of at common law that "prosecutors do not even appear to have even argued that the judge could admit" such evidence. **Giles**, Id.

B. The New Hearsay Law Is A Change To Defendant's Detriment:

No real argument is needed to show that **725 ILCS 5/115-10.6** is detrimental to Defendant's interest. The State cannot make an argument to the contrary in good faith, and any attempt to do so will fail. As shown above, the new hearsay exception of **725 ILCS 5/115-10.6** will allow into evidence unconfronted hearsay testimony of the victim of an alleged murder at a defendant's trial for the alleged victim's murder. This was unheard of under the common law forfeiture doctrine. **Giles**, Id. It also prevents the defendant from objecting to the introduction of the hearsay evidence because he cannot cross examine the **declarant** to expose motive to fabricate, bias, and credibility. Under this ill advised and hastily enacted law, a new class of hearsay declarant witnesses, alleged murder victims, can have their unconfronted hearsay statements admitted without the "truth of the matter asserted" ever being subjected to the crucible of cross-examination, the undisputed best engine of truth. This is undeniably disadvantageous to Defendant.

Further, as the Court is well aware, the general rule regarding hearsay is that it is inadmissible. In fact, the admission of inadmissible hearsay evidence at trial requires reversal of a conviction unless the court determines its admission was ***harmless beyond a reasonable doubt***. **Chapman v. California, 386 U.S. 18, 24 (1967)**. Of course, there are exceptions to the general rule regarding the inadmissibility of hearsay, but those exceptions are grounded on long standing ***objective*** and historically established bases, and many also require the declarant to be available for cross-examination. For example, the medical treatment exception is grounded on the premise that people are usually truthful with their doctor when seeking treatment. The excited utterance exception is grounded on the premise that in the heat of the excitement, the declarant acts in the moment and not out of manipulation. The dying declaration is grounded on the fact that a person who knows death is imminent tells the truth.

Here, **725 ILCS 5/115-10.6** requires that the declarant be unavailable and that the statement

be ***subjectively*** reliable as determined by a judge in a pre-trial hearing by a preponderance of the evidence. This is the exact reason the United States Supreme Court overturned **Ohio v. Roberts 448 U.S. 56 (1980)** and twenty five (25) years of precedent, in **Crawford v. Washington, 541 U.S. 36 (2004)**. The **Crawford** Court stated that the "indicia or reliability" test of *Roberts* for the admission of hearsay was an unworkable failure. **Crawford** pointed out example after example of courts finding statements reliable for contradictory reasons or establishing amorphous eight or nine factor tests for determining reliability. However, despite the **Crawford** Court's rejection of the "reliability" test for hearsay, the State's Attorney of Will County and the Illinois legislature have made a subjective "reliability" test a key part of **725 ILCS 5/115-10.6(e)(2)**. It specifically requires a court to find the proffered hearsay to be subjectively reliable, in direct contravention of the reasoning of **Crawford**. Therefore, the Defendant is disadvantaged because the law allows previously inadmissible hearsay into evidence where the witness cannot be cross-examined and a court has, in contravention **Crawford**, determined the statement to be subjectively reliable by a mere preponderance of the evidence.

Specifically, the statute now provides for a trial before the trial. At the first trial (pre-trial hearing), the State no longer has the burden of proving that the Defendant "murdered" Kathleen Savio beyond a reasonable doubt; the burden is a preponderance of the evidence. And if the State can show that the Defendant killed Kathleen Savio by a preponderance of the evidence, then it gets to introduce potentially damaging evidence at the second trial that it could not otherwise have admitted. This changes the quantum of proof to the great disadvantage of the Defendant.

> The notion that judges may strip the defendant of a right that the Constitution deems essential to a fair trial, on the basis of a prior judicial assessment that the defendant is guilty as charged, does not sit well with the right to trial by jury. It is akin, one might say, to "dispensing with jury trial because a defendant is obviously guilty. **Giles v.**

<u>California</u>, 128 S. Ct. 2678, 2687 (U.S. 2008) citing **<u>Crawford v. Washington</u>, 541 U.S. 36 (2004)**

Similar to the unconstitutional amended statute in **<u>People v. Ramsey</u>, 192 Ill. 2d 154 (2000)**, which changed the rules of evidence to "make it easier for the state," in this case the new law was passed in order to make it easier for the State to convict Drew Peterson. Again, in the State's Attorney's own words, it is "a new law that will enable prosecutors across Illinois to use a murder victim's cries for help as evidence at trial to convict her brutal killer," and the new law "will enable prosecutors to bring previously inadmissible evidence" to trial.

Unlike the amended statute in **<u>Collins v. Youngblood</u>, 497 U.S. 37 (1990)**, which effectively reduced the defendant's sentence, the new law in this case does not reduce anything except Defendant's constitutional right to confront and cross-examine the declarant of statements being admitted against him, which this Court must construe as a substantial disadvantage. Furthermore, unlike in **<u>Thompson v. Missouri</u>, 171 U.S. 380 (1898)**, where a new law was enacted that allowed formerly inadmissible letters written by the defendant to be admitted solely for the purpose of comparison with an unknown letter, the law in question here attempts to allow unreliable and historically inadmissible evidence in at trial for the truth of the matter asserted.

Moreover, unlike in **<u>Thompson</u>**, where a new law gave both sides equal ability to introduce evidence of handwriting examples, **725 ILCS 5/115-10.6** strips only Defendant of his constitutional right to confront and cross-examine the declarant of a statement in order to guarantee the reliability of the evidence. **725 ILCS 5/115-10.6** bestows this new ability to introduce hearsay evidence to the State, and denies it to the Defendant. The State's contention that the State is capable of killing "the declarant in violation of clauses (a)(1) and (a)(2) of Section 9-1 of the Criminal Code of 1961", as required by **725 ILCS 5/115-10.6(a)**, borders on the ridiculous. Neither the State, nor its agent

acting within the scope of his agency, could possibly commit murder. The new hearsay exception is not mutual.

Therefore, the new hearsay exception of **725 ILCS 5/115-10.6,** not only drastically changes Illinois law, but it is also extremely disadvantageous and detrimental to the Defendant.

C. 725 ILCS 5/115-10.6 Fits Squarely Into The Fourth Calder Category:

Finally, there is the issue of whether **725 ILCS 5/115-10.6(a)**, even though it is retroactive and disadvantageous, also fits into the fourth category of *ex post facto* laws as originally set forth in 1798 case of **Calder v. Bull, 3 U.S. 386 (1798)**. Written in the arcane legal vernacular of 1798, the fourth category of ex post facto laws set forth in **Calder** is:

> 4th Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender. **Calder v. Bull, 3 U.S. 386 (1798)**

Over the years, courts have updated this definition to more modern language. For example, in 1972 the Illinois Appellate Court defined the 4th category of *ex post facto* laws as a law which "alter[s] the legal rules of evidence in order to convict the defendant." **People v. Anderson, 53 Ill. 2d 437, 441 (Ill. 1973)**

Then, in 1989, the Supreme Court gave the modern English version of the fourth category when it stated that a law is an ex post facto law "***if it alters the legal rules of evidence to make conviction easier***". **People v. Shumpert, 126 Ill. 2d 344, 351 (Ill. 1989)**. And finally, just a few months ago, the Illinois Supreme Court in **People v. Konetski, 2009 Ill. LEXIS 389, 34-35 (May 2009)** again confirmed this modern language definition by holding a law is *ex post facto* if it, ***"alters the rules of evidence making a conviction easier"***.

Clearly, the hearsay exception of **725 ILCS 5/115-10.6** (1) alters the rules of evidence, and

(2) makes a conviction easier to obtain. The State attacks this modern language restatement of the fourth **Calder** category of hearsay, in two ways. First, the State tells us that Chief Justice Fitzgerald and Justices Kilbride, Freeman, Thomas, Garman, Karmeier and Burke (all concurring in a 7-0 opinion) were in error in **Konetski** when they defined what constituted an ex post fact law. Secondly, the State says that **Konetski** cited to **People v. Ramsey, 192 Ill2d 154 (2000)**, which in turn cited to **People v. Shumpert**, Id, which really states that only a law which lowers the amount of proof necessary to convict is a fourth Calder category *ex post facto* law.

First, all seven Justices of the Illinois Supreme Court concurred in the opinion in **Konetski.** The prosecution cannot simply say the entire bench of the Illinois State Supreme Court didn't mean what they clearly said. We have to assume that seven Supreme Court Justices do not sign off on an opinion unless they have approved it and know what it says and agree that what it says is a correct statement of the law. To hold otherwise is to throw out our entire system of law and justice. The opinion says what it says, and that is the law that Illinois courts are bound to follow.

Secondly, as to **People v. Shumpert, 126 Ill. 2d 344, 351 (Ill. 1989)**, the State's attempt to distinguish this case from the modern definition of the fourth **Calder** category does not hold up to scrutiny. The full quotation from **Shumpert** is:

> A law is ex post facto if it is both retroactive and more onerous than the law in effect on the date of the offense. We have held that a law is ex post facto if it makes criminal an act that was innocent when done, if it increases the punishment for a previously committed offense, ***or if it alters the legal rules of evidence to make conviction easier***. ***Thus***, a law which decreases the degree of proof necessary to convict a defendant is ex post facto if retroactive. **People v. Shumpert, 126 Ill. 2d 344, 351 (Ill. 1989)** (internal citations omitted) (emphasis added)

The State leaves out the "Thus" in its argument. What **Shumpert** says is that a law is a 4th **Calder** category *ex post facto law* if it "alters the legal rules of evidence to make conviction easier," and one

way (but not the only way) it can do that is by decreasing the degree of proof necessary to convict. Remember, the original **Calder** fourth category definition is:

> Every law that alters the legal rules of evidence, and receives less, ***or different***, testimony, than the law required at the time of the commission of the offence, in order to convict the offender. (emphasis added)

So, to meet the fourth **Calder** category, the suspect law must either decease the amount of evidence necessary to convict **or** allow different evidence in order to convict. Either will create an *ex post facto* law if it is applied retroactively. In the modern English statement of this principle the two methods of "receive less" or "different", are combined as "alter" in the statement that the Supreme Court used in **Konetski**, which is that an *ex post fact law* is one which ***"alters the rules of evidence making a conviction easier."*** Finally, even if the Court accepts the State's contention, ignoring the definition of the entire bench of the Illinois Supreme Court, and accept the position that in order for the retroactive application of a new evidence law to be an *ex post facto* law it has to change the quantum of proof necessary to convict, the new hearsay law of **725 ILCS 5/115-10.6** still violates the *ex post facto* provisions of the State and Federal Constitutions.

As every law student knows, "quantum" is Latin for "amount." ("Quantum meruit" means the amount he deserves). **725 ILCS 5/115-10.6** certainly changes the amount of evidence which will be admissible against the Defendant. As shown above, it will allow an entire new type of hearsay evidence, unknown at common law, into evidence at trial: hearsay statements of an alleged murder victim at the trial of the alleged murderer. As Justice Scalia said in **Giles**, Id,

> In cases where the evidence suggested that the defendant had caused a person to be absent, but had not done so to prevent the person from testifying--***as in the typical murder case involving accusatorial statements by the victim***--the testimony was excluded unless it was confronted or fell within the dying-declaration exception. Prosecutors do not appear to have even argued that the judge could admit the unconfronted statements because the defendant committed the murder for which he

> was on trial. **Giles v. California, 128 S. Ct. 2678, 2684 (U.S. 2008)**(emphasis added)

Now, under the new hearsay exception of **725 ILCS 5/115-10.6**, an entire new and never before admitted type of evidence will be admitted by the State in order to convict the Defendant, the hearsay statements of the victims of alleged murders. Further, this evidence will be admitted in a fashion that is in direct contravention with the Defendant's right to a jury trial and proof beyond a reasonable doubt, that being by a judge after a pre-trial hearing with proof by a mere preponderance of the evidence. Again, as Justice Scalia said in **Giles**,

> The notion that judges may strip the defendant of a right that the Constitution deems essential to a fair trial, on the basis of a prior judicial assessment that the defendant is guilty as charged, does not sit well with the right to trial by jury. It is akin, one might say, to "dispensing with jury trial because a defendant is obviously guilty. **Giles v. California, 128 S. Ct. 2678, 2687 (U.S. 2008)**

To say that these do not change the amount (quantum) of evidence being introduced in order to convict the Defendant is to engage in sophistry. It clearly allows in much new evidence, not heretofore admissible under any theory, common law or statutory, which will clearly help convict the Defendant. Such a law, applied retroactively, is an *ex post facto law*, and therefore cannot be used against the Defendant in this case.

V. The Statements The People Seek To Admit Are Testimonial And May Not Be Admitted Pursuant To The Confrontation Clause Of The Sixth Amendment to the United States Constitution And If 725 ILCS 5/115-10.6 Would Allow Them In It Is Unconstitutional.

The United States Supreme Court in **Crawford v. Washington, 541 U.S. 36 (2004)** ruled that the Confrontation Clause is violated by introducing a testimonial statement, regardless of reliability, wherein a Defendant had not had an opportunity to cross examine the testimony. The State argues that the proffered that statements two (2) through seven (7) contained in its Motion To

Admit Statements Pursuant To 725 ILCS 5/115-10.65 are non testimonial, and therefore, do not violate the Confrontation Clause under **Crawford.** In doing so, the State cites to two Illinois Supreme Court cases that actually support the Defendant's position and address and assist this Court in defining testimonial statements.

In **People v. Stechly, 225 Ill. 2d 246 (Ill. 2007)** , the Illinois Supreme Court articulated that if the statements are found to be testimonial, in order for the statements to be admissible, the following applied:

> [T]he threshold question in confrontation clause analysis is, Are the statements at issue "testimonial"? If not, the confrontation clause places no restriction on their introduction (although they are still subject to "traditional limitations upon hearsay evidence" (see *Davis, 547 U.S. at , 165 L. Ed. 2d at 237, 126 S. Ct. 2273*)). If the statements are testimonial, the next question is, Will the declarant testify? If so, the confrontation clause again places no restriction on the introduction of the declarant's prior hearsay statements, as the defendant will have the opportunity to cross-examine--confront--the declarant. *Crawford, 541 U.S. at 59 n.9, 158 L. Ed. 2d at 197 n.9, 124 S. Ct. at 1369 n.9*. ***Finally, if the statements are testimonial and the declarant will not testify, then the statements are inadmissible unless both (a) the declarant is unavailable to testify, and (b) the defendant had a prior opportunity to cross-examine the declarant.*** *Crawford, 541 U.S. at 53-54, 158 L. Ed. 2d at 194, 124 S. Ct. at 1365*.

It is important to note that the **Stechly** Court expressly rejected the State's argument that for statements to be testimonial there must be some sort of police involvement. This conclusion was based on the Court's readings of **Crawford**, and is further supported in **Davis v. Washington, 547 U.S. 813, 822 (2006)**, wherein the United States Supreme Court specifically cautioned that the Court's opinion ought not be read as implying that declarations outside of police interrogation are nontestimonial.

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5 The People's Motion admits that Motion to Admit Statements, Statement #1 is a possible exception.

In this case, it is without dispute that the Defendant had no prior opportunity to cross-examine the declarant. Thus, if the Court properly finds that the statements are testimonial, then without question they are inadmissible.

In **Stechly**, the Court articulated that two components are required in order for the statements to be testimonial and, thus, inadmissible.

> Thus, those "witnesses" whom the *confrontation clause* gives a defendant the right to confront are those who bear "testimony," *i.e.*, ***solemn declarations for the purpose of establishing or proving some fact germane to the defendant's prosecution***.[6] **Stechly, 225 Ill.2d at 281.**

The first component is that the declarant make the statements in a solemn fashion. In making this determination outside the context of police interrogation, the **Stechly** Court articulated

> Accordingly, the question remains how to determine whether statements are testimonial when they are made outside this context. We believe that the only proper focus is on the ***declarant's intent***: Would the objective circumstances have led a ***reasonable person to conclude that their statement could be used against the defendant***?

The second component is that the declarant make the statement with the intent to prove a particular fact. As the **Stechly** Court explained, when the statements explain exactly what the witness would have testified about at trial, they are for a particular fact and satisfy the second component of the **Stechly** Court's definition of testimonial statements. Further, in **Stechly**, **225 Ill.2d at 292**, the Court concluded:

> Accordingly, in our view, the proper question is not whether the declarant actually did intend or foresee that his statement would be used in prosecution. Rather, the question is whether the objective circumstances indicate that a reasonable person in the

6 The Court further noted that although the *Crawford* Court did not spend overly long on this formulation, it was clear the Court intended it to be textual analysis. Moreover, that the importance of the discussion was illustrated by the Court repeatedly returning to this definition and its two components.

> declarant's position would have anticipated that his statement likely would be used in prosecution. See *Cromer, 389 F.3d at 675*; Friedman, *71 Brook. L. Rev. at 252*.

This conclusion is consistent with the United States Supreme Court's analysis in **Davis** wherein the Court clarified **Crawford** in drawing a line between enabling police officers to respond to an ongoing emergency and holding as testimonial statements that "***establish or prove past events potentially relevant to later criminal prosecution***." **547 U.S. 165.**

In this case, the overwhelming testimony will be that Kathy Savio did not trust the Bolingbrook Police Department and, therefore, felt compelled to tell others that if something happened to her, it was not an accident --- Drew Peterson did it. She buttressed this by conferring on these emissaries a story of varying embellishment that speaks of how Drew Peterson was at her home and threatened her in various manners following the separation. It is clear that these statements were made with very specific intention -- being to establish and prove past events knowing it would be relevant in a potential criminal prosecution. This is exactly what the Courts in **Crawford**, **Davis**, and **Stechly** held this Court must protect against.

In **In re Rolandis**, the Illinois Supreme Court again addressed the definition of testimonial. In **Rolandis**, the Court reaffirmed the **Steckly** definition of testimonial as follows:

> "In *Stechly*, the plurality devised a framework for determining whether an out-of-court statement is testimonial. It held that a testimonial statement is one which is ***(1) made in a solemn fashion, and (2) intended to establish a particular fact.*** In general, a statement is testimonial if the ***declarant is acting in a manner analogous to a witness at trial, describing or giving information regarding events that have already occurred.*** *Stechly, 225 Ill. 2d at 281-82*. Of course, this framework begs the question, "Whose intent is determinative--the questioner or the declarant?" After reviewing *Crawford* and *Davis*, the *Stechly* plurality concluded that, when the statement under consideration is the product of questioning, either by the police or someone acting on the behalf of law enforcement, it is the objective intent of the questioner that is determinative. *Stechly, 225 Ill. 2d at 284-85*. However, where statements are not the product of law enforcement interrogation, the proper focus is on the intent of the

> declarant and the inquiry should be whether the ***objective circumstances would lead a reasonable person to conclude that his statement could be used against the defendant***. *Stechly, 225 Ill. 2d at 288-89*. Moreover, the plurality held that, when the declarant is a child, the child's age may be "one of the objective circumstances to be taken into account in determining whether a reasonable person in his or her circumstances would have understood that his or her statement would be available for use at a later trial." *Stechly, 225 Ill. 2d at 295-96*.

In **Stechly**, the Illinois Supreme Court ultimately concluded that the statements made were testimonial in nature. In **In re Rolandis**, the Court held as testimonial two statements made to a police officer and a social worker. However, the Court admitted a statement made by a young child to his mother immediately following an incident of sexual abuse.

Although the Court held this statement to be nontestimonial, the facts of **In re Rolandis** are readily distinguishable from the facts of this case. First, the statements were made to the victim's mother, such that she could immediately respond to the situation in an emergency-like fashion. Second, and perhaps most important, is that the statement was made by a child. As articulated by the Court, when determining "whether a reasonable person in his or her circumstances would have understood that his or her statement would be available for use at a later trial," the child's age is one of the objective factors to consider. It is unreasonable to assume that a child, when simply confiding in his mother after such a horrible incident, would understand that his statements may later be used in a criminal proceeding. Unlike the present case, in **In re Rolandis** there were no objective circumstances from which the Court could determine that the declarant (the young child) understood his statements would be available for later use at trial. In analyzing the objective circumstances surrounding Kathleen Savio's statements need look no further than the declarant's very own statements. From an objective standpoint, in the proffered statements Savio is telling people who to

point a finger at in the event that something were to happen to her and there is a subsequent investigation and trial.

The inadmissibility of such statements is clearly set forth in **In re T.T., 384 Ill.App.3d 147 (2008)**.7 **In re T.T.**, the Court declared statements to be testimonial because they were accusatory when made. In **In re T.T.**, a victim, while receiving medical treatment, made statements to his physician identifying the perpetrator. The Court, in holding such statements testimonial, articulated "[n]evertheless, a victim's statements to medical personnel regarding 'descriptions of the cause of symptoms, pain, or sensations, or the inception or general character of the cause of external source thereof, are not testimonial in nature ***where such statements do not accuse or identify the perpetrator of the assault***. **In re T.T.,** Id**.** It is important to note that although the Court could consider the child's age in its determination, this objective fact could not outweigh the accusatory effect of the child's statement. In **In re T.T.**, the Court held the victim's accusatory statements to be testimonial even after the incident occurred, and even though the victim actually knew who the perpetrator was.

The same certainly cannot be said of this case. Kathleen Savio's statements are essentially that if anything ever happened to her, at any time, for any reason – Drew did it. If the Court in **In re T.T.** did not admit the victim's accusatory statements ***after*** the incident occurred, ***actually knowing*** who the perpetrator was, then even further removed from the realm of admissibility are Savio's embellished, speculative declarations. Statements made purporting to establish prior facts for later use at trial, such as in the present case, are exactly the evils against which the Sixth Amendment necessarily includes a right of confrontation. It is for such reasons that Courts have long and

7 **In re T.T.** is distinguishable from **In re Rolandis** based on a longer amount of time passing between the statement and the incident and the circumstances under which the statements were made. In **In re Rolandis**, the child's statements were made in confidence to his mother, leading to the more likely conclusion that it would be considered nontestimonial As distinguished from **In re T.T.** wherein the statements were made to a physician treating the victim for

unanimously held that Defendant's right to confront the witnesses against him and his right to a fair trial go hand in hand.

Based on **Crawford** and subsequent United States Supreme Court and Illinois Supreme Court decisions, the once blurry line surrounding testimonial statements has become quite clear. The Courts have gone to great lengths to ensure that unchallenged testimonial statements have no place in our system of justice. Statements are testimonial if two requirements are satisfied. First, the statement is made in a solemn fashion; and second, the statement is intended to establish a particular fact. In this case, each prong is satisfied with respect to Savio's statements, thus Savio's statements are testimonial, and without Defendant being able to cross examine the declarant, Savio's statements are inadmissible at trial under **Crawford** and its progeny. And to be sure, the United States Supreme Court has left no room for interpretation in this area, such that **725 ILCS 5/115-10.6** could be deemed anything but unconstitutional.

VI. The New Statute Is Unconstitutional Because It Allows In Hearsay Statements Of An Alleged Murder Victim In Violation Of Giles:

As shown above, the hearsay testimony of a murder victim accusing Defendant was never allowed into evidence, even under the common law doctrine of forfeiture by wrongdoing. **Giles v. California, 128 S. Ct. 2678, 2684 (U.S. 2008)**

> In cases where the evidence suggested that the defendant had caused a person to be absent, but had not done so to prevent the person from testifying--as in the typical murder case involving accusatorial statements by the victim--the testimony was excluded unless it was confronted or fell within the dying-declaration exception. Prosecutors do not appear to have even argued that the judge could admit the unconfronted statements because the defendant committed the murder for which he was on trial. **Giles v. California, 128 S. Ct. 2678, 2684 (U.S. 2008)**

However, **725 ILCS 5/115-10.6** would allow, and is specifically designed to allow, the hearsay

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the injuries that he sustained from the actual incident after a greater amount of time had separated the statement from the actual incident, leading to the more likely conclusion that the statement is testimonial.

statements of an alleged murder victim accusing a defendant. This is an unconstitutional expansion of the doctrine of forfeiture by wrongdoing beyond what is allowed by **Giles**. Therefore, because the new hearsay exception would unconstitutionally expand the doctrine of forfeiture by wrongdoing beyond what the common law provided, which is all **Giles** allowed.

VII. Illinois Has Not Adopted Federal Rule Of Evidence 804(b)(6) And Therefore The State's Arguments Applying It And Other Pre-Giles Cases Do Not Apply;

In its Responses, the State spends a great deal of effort arguing to defeat Defendant's position by referring to Federal Rule Of Evidence 804(b)(6), and cases interpreting this rule. The State's position is that since FRE 804(b)(6) is a mere codification of the common law doctrine of forfeiture by wrongdoing and that since **725 ILCS 5/115-10.6** is also a mere codification of the forfeiture law, that these cases are instructive. However, the problem with this argument is three fold. First, as shown above, clearly **725 ILCS 5/115-10.6** is not a mere codification of the common law, it goes far beyond what the common law allows. Second, Illinois has not adopted FRE 804(b)(6). We have, however, unwisely adopted **725 ILCS 5/115-10.6**. These two statutes are as different as night and day. Federal Rule of Evidence 804(b)(6) provides:

> (6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness. **USCS Fed Rules Evid R 804(b)(6)**.

One can see at a glance how this rule differs from **725 ILCS 5/115-10.6**. FRE 804(b)(6) is mutual, is not restricted to murders, does not call for a mini-trial, and is simply a mere codification of the common law doctrine of forfeiture by wrongdoing. As a codification of that doctrine, it must comport with the common law as defined by the U.S. Supreme Court in **Giles**.

Lastly, every case cited by the State in their briefs on this issue is **pre-Giles**. In **Giles**, Justice Scalia goes to great pains to define and describe the scope of the common law doctrine of forfeiture

by wrongdoing. By the nature of our legal system, any prior case that differs from this definition of the scope of the doctrine of forfeiture by wrongdoing is overturned. Therefore, we do not have to look any further than **Giles** to know what is constitutional and what is unconstitutional as far as forfeiture by wrongdoing is concerned.

Finally, nothing in FRE Rule 804(b)(6), in a post **Giles** world, would indicate that one can cross over from the civil to the criminal arenas. If a person kills another because he cheated him in cards, or because he is suing him in a civil case, let the killer be prosecuted. However, nothing in the common law doctrine of forfeiture, as defined by **Giles**, states that because the murder was committed to stop a civil case, additional unconfronted hearsay evidence should be allowed in the murder trial.

Conclusion

The Constitution provides the right to be free from *ex post facto* laws and the right to confront witnesses, and Illinois Statutory law also prohibits the retroactive application of statutes which affect the substantive rights of a defendant. The new hearsay exception law violates both of these constitutional rights as well as the Illinois savings clause. The statute changes the rules of evidence in hopes of being able to obtain a conviction of the Defendant. Additionally, the law strips the Defendant of his right to confront witnesses in order to show the reliability of the testimony. Therefore, 725 ILCS 5/115-10.6 must be overruled as unconstitutional.

Respectfully submitted,

ABOOD LAW FIRM
Co Counsel for Defendant

Dated: September 11, 2009

/s/ Andrew Abood

Andrew P. Abood (P43366)
Abood Law Firm
246 East Saginaw Street, Suite 1
East Lansing, Michigan 48823
(517) 332-5900 / (517) 332-0700

BRODSKY & ODEH
Co Counsel for Defendant

Dated: September 11, 2009

/s/ Joel A. Brodsky

Joel A. Brodsky
Brodsky & Odeh
8 S. Michigan Ave., Suite 3200
Chicago IL 60603
(312) 701-3000